



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

401

Cape of Good Hope. Supreme Court. 625

REPORTS OF ALL CASES

DECIDED

IN THE SUPREME COURT

OF THE

CAPE OF GOOD HOPE,

DURING THE MONTHS OF JANUARY, FEBRUARY, AND
MARCH, 1895.

(WITH TABLE OF CASES AND DIGEST.)

REPORTED BY

J. D. SHEIL,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND ADVOCATE OF THE
SUPREME COURT.

VOL. V.—PART I.

(1895.)

CAPE TOWN:

PRINTED AND PUBLISHED AT THE "CAPE TIMES" OFFICE, ST. GEORGE'S ST.

1895.

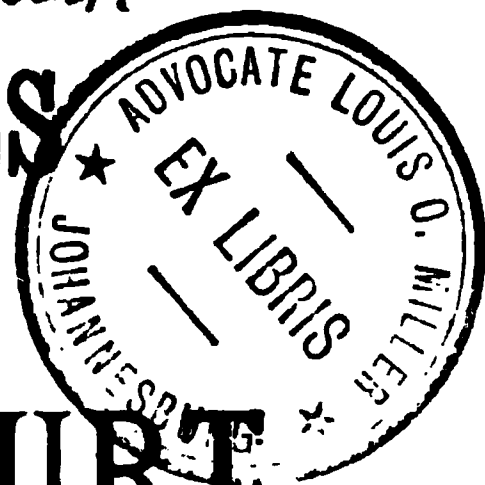


TABLE OF CASES.

	PAGE		PAGE
Abelsohn's Trustee v. Van der West- huizen	57	De Villiers, <i>ex parte</i>	14
Alford, Wills & Co. v. Brink	128	" v. Van Dyk... ..	129
Aling, <i>ex parte</i>	7	Dickson & Co. (Limited), <i>re</i>	12
Aliwal North Board of Executors (in liquidation), <i>re</i>	141	" v. Dickson	20, 71, 90
Anderson v. Anderson	22	Doe v. Brown	79
Anderson's Executors v. Welgemoed	57	Du Plessis v. Ferreira	99
Atmore v. Shaddock	59	Eagle, <i>ex parte</i>	11
Beedle & Co. (Limited), <i>re</i>	68, 76	Ebden v. Botha	128
Beetham v. Slamie	100	Eilenberg v. Jacobson & Co.	1
Benjamin v. Benjamin	22	Engel's Estate, <i>re</i>	19
Berghuis, <i>ex parte</i>	14	Erasmus v. Moolman	98
Black v. La Grange and another	2	"Ernestine," <i>re</i>	53
Boalch v. Schiemann	98	Ferreira's Estate, <i>re</i>	19
Borchers, <i>ex parte</i>	58	Field & Co. v. Wernikoff	26
Bosman, <i>ex parte</i>	2	Findlay & Co. v. Klaas and another	129
Botha, <i>ex parte</i>	14	Forrester, <i>ex parte</i> .— <i>Re</i> Minors Starck	11
Bradford v. Green and another... ..	129	Fossati v. Kleynhans	140
Brande v. Verdoes	104	Fraser v. Cunningham	58
Breytenbach v. Smuts' Executors and others	59	Freemantle v. Henning	6
Burdett's Estate, <i>re</i>	19	Frere Hospital, East London, <i>ex parte</i> Managers	10
Burmeister and others, <i>ex parte</i> .— <i>Re</i> "Ernestine"	68	Furnivall v. Cornwell's Executors	14
Burmeister v. Schiemann	98	Greeff v. Pretorius	132
Burns v. Town Council of Cape Town	82	Grundling's Executor v. Lategaan and others	140
Cape of Good Hope Bank (in liquida- tion), <i>re</i>	71, 98, 129	Haarhoff's Insolvent Estate, <i>re</i>	140
Clark, <i>ex parte</i> .— <i>Re</i> Clarke's Estate	59	Haase, Vaughan & Co. v. Malcolm's Trustee	23
Clements & Co. v. Van Rbyn	38	Hartford v. Walker	70
Clements & Co. v. Vos	38	Hauptfleisch v. Hauptfleisch	38, 80
Coetzee v. Erlank	57	Hearns v. Jackson	137
Colonial Orphan Chamber v. Stewart	128	Hiddingh v. Uys	98
Combrinck & Co. v. Colonial Govern- ment	105, 130	Hill Bros. v. Reich	68, 130
Cook Bros. v. Colonial Government, 58, 72, 107, 140		Hope v. Ilario	136
Da Silva v. Da Silva	19	Hough's and Du Plessis, Ante-nuptial Contract, <i>re</i>	12
Day v. Day	20, 37	Hudson, Vreede & Co. v. Cooper	129
De Beers Consolidated Mines v. Kim- berley Waterworks Co.	101, 129	Hugo, <i>re</i>	59
De Wet, <i>ex parte</i> .— <i>Re</i> minors Kruger... ..	71	Humphries, <i>ex parte</i>	19
		Hyland v. Schiemann	98
		Jacobsohn, <i>ex parte</i>	70
		Jansenville Municipality, <i>re</i>	8

	PAGE		PAGE
Jenner, <i>re</i> ...	59	Peterson v. Biocard ...	2
Jones v. Town Council of Cape Town...	27	Pienaar v. Rattray ...	67
„ v. Vickers' Trustee ...	34	Pilgram, <i>ex parte</i> ...	2
Kerdel v. Bam ...	25	Pretorius v. Greeff ...	19, 99
Kohler and others v. Baartman ...	104	Prince, Vincent & Co. v. Landau ...	57
Kruger, <i>re</i> ...	2	Provident I. & T. Co., <i>re</i> ...	2
Kruger (Minors), <i>re</i> ...	71	Raphael, <i>ex parte</i> ...	98
Lawrence v. Lawrence ...	105, 133	Regina v. Abraham and others ...	66
Laws, <i>ex parte</i> ...	7	Regina v. Blauwveroi ...	53
Le Roux's Estate, <i>re</i> ...	72	„ v. Klaas ...	9
Levenson, <i>ex parte</i> ...	2	„ v. Kock ...	80
Levin v. Wassermann ...	1	„ v. Neethling ...	65
Lindenberg v. Naudé ...	3	„ v. Sym ...	13
London and S.A. Exploration Co. v. G.W. Diamond Mining Co. ...	4	„ v. Vlak ...	68
Louw v. Kupke ...	14	„ v. Vyfer and Jaftha ...	66
Malcolm's Trustee v. Haase, Vaughan & Co. ...	19	„ v. Ware ...	21
Malmesbury Board of Executors v. Basson ...	128	„ v. Wessels ...	7
Mandy's Insolvent Estate, <i>re</i> ...	35, 105, 129	„ v. Williams ...	20
Marais v. Binder ...	58	„ v. Zwart and Jantjes ...	140
Markham v. Frame ...	76	Roberts v. Roberts ...	37
Marsh v. Mannix ...	1	Rodger's Executors v. Jessop ...	95
Mason v. Mason ...	18	Rosenthal, <i>ex parte</i> ...	34
Master v. Brink's Executrix ...	2	Ross v. Farmer ...	3, 13, 24
„ v. Dismore's Executrix ...	128	„ & Co. v. Lotze ...	129
„ v. McDonald's Executors ...	58	Rossouw, <i>ex parte</i> ...	2
„ v. Nicholson's Trustee ...	3	Roux's Estate, <i>re</i> ...	72
„ v. Prins' Executors ...	3, 19	Rowe's Insolvent Estate, <i>re</i> ...	90
McCahy v. Williams ...	136	Russell, <i>ex parte</i> ...	58
McGibbon, <i>ex parte</i> ...	35	Schmidt v. Schmidt's Executors ...	71
McGrath v. McGrath ...	20	Scholtz v. Du Plessis ...	2
McKenzie & Co. v. Schiemann ...	98	Scott v. Dodwell ...	129
McLaren & Co. v. Smidt ...	98	Searle & Sons v. Horsfall ...	14
Meiring's Estate, <i>re</i> ...	57	Sharpe, <i>ex parte</i> ...	139
Minto, <i>ex parte</i> ...	99	Short & Co. v. Schiemann ...	98
Myburgh, <i>ex parte</i> ...	2	Simons v. Simons ...	94
Myburgh's Assignees v. Taylor ...	2	Slabber's Insolvent Estate, <i>re</i> ...	60
Newman v. Mayor of East London ...	41	Slabber v. Meezer's Executor ...	130
Nolte and another v. Registrar of Deeds ...	105	Slebusch, <i>re</i> ...	20
North Eastern Bultfontein Co., <i>re</i> ...	9	Smith, <i>ex parte</i> .— <i>Re</i> Titterton's Estate ...	17
Oakeshott's Trustee v. Bank of Africa ...	68	Smith v. Smith ...	20, 99
Otto, <i>re</i> ...	129	„ v. Theron ...	128
Parkin v. Lippert ...	65, 129, 141	Smuts' Trustees v. Van Zyl's Executors ...	91
Petersen v. Frame and Wife ...	1	Spies (Minors), <i>re</i> ...	36
		Steenkamp's Executors v. Wiese ...	60
		Steyn's Trustee v. Gous ...	140
		Stockdale v. Van Zyl & another ...	14
		Stoffels v. Mills & Rethman (Limited) ...	29
		Stoney, <i>ex parte</i> ...	10
		Strasburger v. Trebor Frères ...	76

TABLE OF CASES.

V

	PAGE		PAGE
Strydom v. Strydom's Trustee ...	140	Van Ryn W. & S. Co. v. Botes...	14
Stuurman, <i>re</i> ...	71	Van Staaten, <i>ex parte</i> ...	14
Tabata and others, <i>ex parte</i> ...	71	Van Vuuren's Insolvent Estate, <i>re</i> ...	53
Tenant v. Nortje ...	98	Van Wyk's Estate, <i>re</i> ...	72
Thwaits v. Brand... ..	14	Vickers' Insolvent Estate, <i>re</i> ...	3
Town Council v. Smuts ...	2	Visser v. Du Plessis ...	2
Trautmann v. Imperial Fire Assurance Co.	68	Wardel v. Krynauw ...	31
Truwer, <i>ex parte</i>	36	Whitting v. Whitting ...	130
Truter v. Truter ..	14, 80	Whittle, <i>ex parte</i> ...	129
Union Gold Mining Co., <i>re</i> ...	2	Willems v. Willems ...	129
Van Aardt v. Jefferson ...	1	Wills v. Laubmeyer and Wife ...	98
Van Bloemtsen v. Orchard ...	14	Wilson, Son & Co. v. Klerk ...	2
Van der Westhuizen v. Cohen Bros. ...	56	" " v. Millen ...	2
Van Eyssen, <i>ex parte</i>	14	Wolff v. Solomon's Trustee ...	72, 105
Van Hoeven's Executors v. Jacobs' Exe- cutors... ..	98	Woolf's Insolvent Estate, <i>re</i> ...	141
Van Noorden v. Myburgh ...	1	Wynberg Infant School, <i>ex parte</i> Managers	11
" v. Van Zyl	100	Zeederberg & Co. v. De Villiers ...	2



CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT. (IN CHAMBERS.)

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice.)]

KILLENBERG V. JACOBSON AND CO. { 1895.
Jan. 3rd.
Attachment—Out-standing debts—Unsatis-
fied judgment.

This matter was before the Court on Thursday last, and was ordered to stand over for the return of the Deputy Sheriff of Namaqualand. It appeared from the petition that on the 22nd November last the petitioner obtained judgment against Isaac Jacobson and Josef Dembezer, trading at Springbok, Namaqualand, under the style or firm of Jacobson & Co., for the sum of £1,069 15s. 2d., together with interest at 6 per cent. from October 16, 1894. That on November 23 last the petitioner caused a writ to be issued in execution of the judgment, and taxed costs £9 1s. 2d. In execution of the writ, the Deputy Sheriff of Namaqualand attached all the loose assets of the firm, which were sold on the 21st December, there being still a deficit of about £470. The petitioner alleged that the firm of Jacobson & Co. were still possessed of outstanding debts due to it by various persons, and worth about £200. That the firm was also possessed of certain two erven. Nos. 82 and 83, situate in the village of Springbok, which are registered in the name of the partner Isaac Jacobson. The prayer was for an order authorising the issue of a writ for the attachment and sale of the outstanding debts of the firm of Jacobson & Co., and of the erven.

Mr. Sheil was heard in support of the application.

The Court granted the order as prayed.

[Applicant's Attorneys, Fairbridge Arderne & Lawton.]

B

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

VAN NOORDEN V. MYBURGH. { 1895.
Jan. 12th.
Mr. Currey applied for provisional judgment on a promissory note for £32 10s.
Granted.

LEVIN V. WASSERMAN.

Mr. Rose-Innes, Q.C., with him Mr. Buchanan, applied for a decree of civil imprisonment on a judgment debt of £64 1s. 10d. for costs. Certified copies of the judgment and the writ, and the return of *nulla bona*, were put in.
Granted.

VAN AARDT V. JEFFERSON.

Mr. Benjamin applied for provisional judgment on a mortgage bond of £300, and interest at 12 per cent. from 28th August, 1893, and asked that the property be declared executable.
Granted.

PETERSEN V. FRAME AND WIFE.

Mr. Tredgold applied for provisional judgment on an acknowledgment of debt for £100, and interest from 1st October, 1892, less £25 paid on account, and also for £11 13s. 4d.
Granted.

MARSH V. MANNIX.

Mr. Currey applied for provisional judgment on a mortgage bond for £58, with interest at 7 per cent. from 22nd January, 1894,
Granted.

ZEEDERBERG AND OTHERS V. DE VILLIERS.

Mr. Graham applied for the final adjudication of the defendant's estate.

Decreed.

BLACK V. LAGRANGE AND ANOTHER.

Mr. Tredgold applied for provisional judgment on a promissory note for £101 17s. 6d., dated September 19, 1894.

Granted.

WILSON V. MILLEN.

Mr. Graham applied for provisional judgment on a promissory note for £26 1s. 10d., with interest from 1st December, 1894.

Granted.

THE MASTER V. BRINK'S EXECUTRIX.

Mr. Giddy applied for an order against the defendant to file her account.

Granted.

PATERSON V. BICCARD.

Mr. Buchanan applied for judgment for £14 17s. 9d., goods sold and delivered.

Granted.

TOWN COUNCIL V. SMUTS.

Mr. Buchanan applied for judgment for £28 17s. 6d., arrear of rates.

Granted.

SCHOLTZ V. DU PLESSIS.

Mr. Graham applied for judgment for £2,500, balance of purchase money of a certain farm, with interest from 1st May, 1893, defendant being in default.

Granted.

WILSON, SON AND CO. V. KLERCK.

Mr. Graham applied for provisional judgment for the costs in this case, the principal sum having been paid.

Granted.

VISSEK V. DU PLESSIS.

Mr. Maskew applied for judgment for £90 6s. for goods sold and delivered, less £13 4s. 2d. contra account.

Granted.

MYBURGH'S ASSIGNEES V. TAYLOR.

Mr. Molteno applied for judgment for £33 9s. 8d., goods sold and delivered.

Granted.

REHABILITATIONS.

On motion from the bar, the following rehabilitations were granted: Jan Petrus Bosman, Bernhard Pilgram, Rudolph Myburgh, and Jacobus Francois Rossouw.

Re DANIEL JOHANNES GERHARDUS CILLIE.

This application was ordered to stand over for a proper balance-sheet to be prepared.

Re RAPHAEL ALEXANDER.

This application was ordered to stand over so as to give notice to the trustee.

Re ABRAHAM STEPHANUS VAN STRAATEN.

This application was ordered to stand over for production of proof of service of notice upon the trustee.

GENERAL MOTIONS.**IN THE MATTER OF THE MINOR ABRAHAM KRUGER.**

Mr. Tredgold applied for authority to the Master of the Supreme Court to pay out certain moneys to the credit of the minor in the Guardians' Fund to enable him to pay his share of the cost of subdivision of the farm Vaaland, in the district of Albert, and to purchase stock to carry on farming operations.

The Court granted an order as to £30 costs for the partition of the farm; but as to the balance it not appear that there was such pressing necessity as to warrant the granting of the order.

Re PROVIDENT INSURANCE AND TRUST CO.

Mr. Graham presented the report of the liquidator appointed for the voluntary liquidation of this company.

The Court ordered the report to be filed.

UNION GOLD-MINING COMPANY.

Mr. Rose-Innes, Q.C., presented the report of the liquidators appointed for the voluntary liquidation of this company.

The Court ordered the report to be filed.

THE PETITION OF LEWIS LEVENSON.

Mr. Jones asked the Court to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act, 1881, for registration in the name of petitioner of certain

land and buildings, situate at the corner of Bree and Church-streets, Cape Town, purchased from the insolvent estate of Alexander Maderose.

The Court made the rule absolute.

IN THE INSOLVENT ESTATE OF JOHN VICKERS.

Mr. Molteno applied for a rule *nisi* requiring the trustee of the said estate to show cause why he should not be ordered to frame a contribution account against the creditors of the estate for the purpose of satisfying certain judgment of the Periodical Court at Lady Grey.

The Court ordered the matter to stand over, so that notice might be given to the trustee.

THE MASTER V. NICHOLSON'S TRUSTEE.

Mr. Giddy applied for order requiring the respondents to file documents and accounts of liquidation and plans of distribution in respect of the said estates.

The Court granted the order as prayed.

THE MASTER V. PRINS' EXECUTORS.

Mr. Giddy applied for leave to make absolute the rule *nisi* requiring the respondents to show cause why orders shall not be granted for the attachment of their persons for contempt of Court, in failing to comply with orders directing them to file accounts of the administration of their trusts.

The Court ordered that notice be given, returnable the first day of term.

ROSS V. FARMER.

Mr. Molteno asked the Court for rule *nisi* requiring the respondent to give applicant security to abide the result of an action for the recovery of damages for defamation of character, and of a claim for wages, about to be instituted by applicant.

The Court made the rule absolute; the question of costs to stand over.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

LINDENBERG V. NAUDE. { 1895.
Jan. 14th.

Provisional sentence—Mortgage bond—Interest.

Mr. Rose-Innes, Q.C., moved for provisional sentence for the sum of £900, being the balance due on a mortgage bond for £1,600, with interest at 6 per cent. from December 1, 1892, less £6 16s. 1d. paid on account, the bond being due by reason of non-payment of interest.

Mr. Searle, Q.C., appeared for the defendant, and read his affidavit, in which he alleged *inter alia* that between the 1st December, 1892, and 1st December, 1894, he had paid the plaintiff various sums of money amounting together to £105 on account of interest due on the bond; that he had been summoned without having received any demand; that on several occasions he asked the plaintiff to send him an account showing how they stood with regard to the interest on the bond, but that although he promised to do so, the plaintiff failed to keep his promise; that as far as he was aware there was only a sum of £3 due as interest, which he was always ready and willing to pay on demand; that he held receipts for most of the amounts paid. The defendant annexed three receipts showing payments amounting to £65, which he alleged had not been credited by the plaintiff.

The last receipt was dated 20th October, 1894.

The plaintiff in his replying affidavit alleged *inter alia* that he kept an account current with the defendant, wherein capital and interest on the bond were brought up; that on 31st December, 1892, a balance was struck showing £17 3s. 11d. due to plaintiff for interest reckoned to the 1st December, 1892, which account and balance the defendant acknowledged in writing to be correct.

That on 30th December, 1893, he furnished the defendant with a copy of their complete account current showing a balance of £984 3s. 11d. due to plaintiff, represented by £900 capital and £84 3s. 11d. interest, calculated to the 1st December, 1893.

That he arrived at the amount of interest due to date of issue of summons in the following manner: To the balance of £84 3s. 11d. interest

due to 1st December, 1893, he added twelve months' interest to 1st December, 1894, making a total of £156; deducting from this sum the £56 paid by defendant would leave £91 3s. 11d. This last-named sum being equivalent to two years' interest on the bond of £900 calculated at 6 per cent. per annum less, £16 16s. 1d. He claimed interest from 1st December, 1892, as stated in the summons, but instead of a sum of £6 16s. 1d., a sum of £16 16s. 1d. should have been allowed as part payment.

That on 27th October, 1888, defendant undertook in writing to pay interest on the whole bond at 8 per cent; on the 28th May, 1889, plaintiff undertook to accept interest at 6 per cent on £500 and at 8 per cent on £400, and in May, 1893, the defendant again undertook to pay interest at 8 per cent on £900.

Hence the reason for bringing up interest in account current. That the various sums of money paid by defendant were payments made on account current to meet the increased rate of interest above that stated in the bond.

Mr. Searle, Q.C.: Owing to the manner in which the plaintiff has dealt with the interest in the account current he cannot succeed in a claim for provisional sentence. There has practically been a novation. On the plaintiff's own showing the defendant has paid much more than he has been given credit for in the summons.

Mr. Rose-Innes, Q.C., was not called on.

The Court granted provisional sentence.

The Chief Justice said: In terms of the bond the interest was payable in November. That interest has not been paid. If the defendant had produced any receipts for interest paid after November it might be held that there had been a waiver, but no such receipts have been produced. The Court can take no notice of the subsequent agreement as to payment of interest at 8 per cent. Provisional sentence will be granted for the capital sum and two years' interest at 6 per cent., per annum less £65 paid on account, with costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorneys, Messrs. Sauer & Standen.]

LONDON AND SOUTH AFRICAN EX-
PLORATION CO. V. GRIQUALAND { 1895.
WEST DIAMOND-MINING CO. { Jan. 14th.

Mines and Minerals—Diamondiferous ground
—Inspection—*Prima facie* evidence of the
existence of diamonds.

*Where the applicants had leased certain ground
to the respondents, and under the lease they*

*were entitled to a surrender on the discovery
of diamonds in the ground leased, the Court
on being satisfied that there was prima-facie
evidence of the existence of diamonds in the
land in question ordered an inspection of
the ground for the purposes of a pending
action.*

This was an application on notice to the respondent company that the latter would be required to show cause:

(a) Why the plaintiffs shall not be allowed with their witnesses to go upon the land at present in the occupation of the defendants as depositing-floors, possession whereof is claimed in this suit, for the purpose of locating the spots thereon in which diamonds have been found or which are known to be diamondiferous.

(b) Why the plaintiffs shall not have the right by themselves or their agents and others, with or without the assistance of a supervisor to be appointed by this Honourable Court, to inspect and test the ground so in dispute, for the purpose of affording to the Court proof whether the same be diamondiferous.

(c) Why the plaintiffs shall not have such further relief in the premises as in the circumstances is meet; and

(d) Why the costs of this application, and of the carrying out of any order granted by this Court in respect thereof, shall not be costs in the cause.

It appeared from the affidavit of Mr. Jno. Blades Currey, manager of the applicant company, that the company is the registered proprietor of the farm upon which are situated the floors of the late Orion Diamond-mining Company (Limited), now held by the respondent company.

In terms of the lease under which the respondent company holds the land the applicant company is entitled to a surrender to them by the respondents of the land if proved to be diamondiferous.

That certain information had been received by the applicant company to the effect that a diamond-mine exists upon the said floors. In consequence of such information the company had entered into an agreement with Messrs. Coghlan & Coghlan, of Kimberley, acting *q.q.*, giving them the right to prospect upon the said floors, and to locate and acquire claims thereon not exceeding 200.

That Coghlan & Coghlan had paid £500 for such rights, and had further agreed to pay £150 per claim for all claims taken up, and also £1 10s. per month as rent for each claim.

In support of the application, one Jenkin deposed that he resided on the Diamond-fields from 1881 till June, 1894, during which time (except for a few months when he was out of employment) he worked as a miner in the Du Toit's Pan and Bultfontein mine. That he worked for the respondent company for several years, and after that company's property was taken over by the De Beers Mines he continued to work for the latter company until February 1894, when he was dismissed.

During part of the time that he was working for the De Beers Mines he was employed in what is known as the Orion Company's floors, which belonged to the respondent company. That about the middle of last year he heard reports that there was a mine on the Orion floors. That a man named Osborne told him roughly whereabouts the mine was. He had been the claim manager of the Orion Company.

That in September, 1893, deponent went to the spot on the Orion floors about which Osborne had told him and about 100 yards from where deponent sank a hole about 12 feet deep. He employed three natives to assist him. There was limestone on the surface of the ground. At a depth of between seven and eight feet he struck yellow ground. He worked about four feet into this. In the same month he took out a bucketful of yellow ground. He worked this ground. He found no diamonds in this ground but found carbon, garnets, and mica. The ground was what is known as yellow ground and gave every indication of being diamondiferous. It was very similar in appearance to the diamondiferous yellow ground in the Du Toit's Pan mine.

That he did nothing more after washing this ground until the month of February, 1894, when he again went to the same spot. He took out a bucketful of ground and washed it. In this ground he found three small diamonds, weighing in all about half a carat. These diamonds he handed to one Birkley, who was then living at Bultfontein with a view to getting the right to acquire claims from the Exploration Co on the spot. Birkley tried to get such rights but he was not successful.

That the spot in question had been worked down to a depth of about six feet before he touched it. There was a hole there which from its appearance had been dug some two or three years previously.

That he had been informed that this hole had since been filled up.

That he could point out and locate the spot on the floors where he found the diamonds. That the spot was about 300 yards N.N.E. from

the Griqualand West Co.'s washing machine and about the same distance south of Blanckenberg's Vlei.

That there is a road running from the North Circular Road to the washing machine of the G.W.D. Mining Co., and from the N.N.E. along the Orion floors. About six yards to the right of the road proceeding from the washing machine is the spot where he found the diamonds.

Other affidavits testifying to the diamondiferous nature of the soil in question were filed.

For the respondent company, Mr. Gardner Fred. Williams, general manager and director, deposed that on the 13th October, 1894, in company with others he visited the spot referred to in Jenkin's affidavit. That the hole was being re-opened on their arrival at the spot, and after being completely cleared of all the soil that had been thrown into it, it was sunk down some inches into undisturbed ground. That he measured the hole at the time and found it to be eight feet. That he carefully examined the ground in the hole from the surface to the bottom, and he said positively that it did not contain diamondiferous ground, but showed on the surface lime and the rest being a bluish and rusty shale. That the undisturbed ground which was dug out was carefully examined and was not yellow or diamond-bearing ground. That adjacent to this hole there was then and is now lying the remains of blue ground previously deposited there when work was being carried on. That in places this blue ground lies on the floor from two to three inches in depth.

The deponent said that from his personal knowledge lime stone, basaltic rock and shale are found all over the country in the vicinity of the Diamond-fields and are not indications of the existence of diamondiferous soil.

There were other affidavits to the same effect, and which alleged that the respondent company had no objection to an examination of the holes already sunk, but that objection was raised to the applicant company prospecting the entire area of the floor.

Mr. Searle, Q.C. (with him Mr. Currey), was heard in support of the application, and relied on *London and South African Exploration Company v. De Beers Mines* (3 Sheil 300).

Mr. Rose-Innes, Q.C., and Mr. Solomon, Q.C., for the respondent company.

The Chief Justice said: I must repeat the observation that I have made frequently during the argument, and that is that the *bona fides* of the applicants is an important ingredient in these cases, and as there has been a failure in a previous case to use the land surrendered as diamondiferous, the *bona fides* of the applicants

is very much diminished, and if any more of these applications should be made, after it has been seen that in previous cases there had been no *bona-fide* work done on the land, the Court would be inclined to doubt whether there is, in these fresh applications, any intention to use the land as a diamond-mine. In the present case there is some *prima-facie* evidence that diamonds have been found on the spot mentioned in the declaration, and the Court will make an order appointing Captain Quintrall, viewer, to inspect the holes mentioned in the affidavit of the applicants, for the purpose of ascertaining whether the soil is diamondiferous, and for that purpose to deepen and widen the said holes; and further, authorises him that in case diamondiferous soil should be found, to dig three more holes within the area coloured red on the plan annexed to the declaration. Costs of the application to be costs in the case.

Mr. Justice Buchanan: I concur in this order, but I must express my own individual opinion that the *prima-facie* evidence that this ground is diamondiferous is in this case very meagre indeed; in fact, but for the offer made by the respondents themselves to allow the ground to be examined, I should have had difficulty in consenting to the order.

Sir Thomas Upington: I also agree that the question of *bona fides* would affect my mind very much in these cases.

Mr. Innes: I suppose that Captain Quintrall will use his discretion in widening or deepening the holes?

The Chief Justice: It is left with Captain Quintrall.

Mr. Searle: Each party, as in the previous case, can send one representative,

The Chief Justice: Yes, the order can be amended accordingly, the Court appointing Captain Quintrall, "together with one person appointed by the applicants, and one by the respondents."

[Applicants' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondents' Attorneys, Messrs. Scanlen & Syfret.]

FREE MANTLE V. HENNING. { 1895.
Jan. 14th.
Partnership — Application for Interdict refused.

This was an application for an interdict restraining the respondent from carrying on alone and without the assistance of applicant certain partnership business in the district of Albert, pending an impartial audit of the books, and an action for the recovery of damages for breach of contract.

The facts are briefly these:

The applicant and respondent entered into an agreement to carry on for one year a country business on the farm Grootvlei belonging to respondent, who was also to furnish £100 (half of the partnership capital) and suitable premises; Mrs. Freemantle to furnish the other £100 and her husband (married out of community) to act as her agent in the matter. Goods to the value of £300 were purchased, the capital being increased; and Henning gave a promissory note at four months for this amount. Freemantle was made manager at Grootvlei; Henning taking charge of a branch business started on joint account at Odendaalstroom with part of the Grootvlei stock.

On the promissory note falling due Henning had to pay £250 out of his private estate, Mrs. Freemantle not having contributed her share of the capital. Freemantle ordered goods contrary to express instruction to the value of £208; and Henning had to warn the firms supplying them not to execute order except on his own express authority. Freemantle moreover seriously injured the business at Grootvlei by absenting himself for several days at a time without leaving anyone in charge; and by habits of intoxication.

Henning therefore proposed to Mrs. Freemantle a dissolution of the partnership subject to an audit of the books: the partnership having still six months to run. Freemantle immediately without notice to Henning closed up the business at Grootvlei and left; but Henning subsequently took charge of the Grootvlei store also—having to pay £260 out of his private estate to meet claims made in connection therewith.

Mrs. Freemantle had consented to an audit being made but disputed the auditor's accuracy on his report being presented, and applied for an interdict to prevent Henning carrying on the partnership business without the assistance of Freemantle, pending an impartial audit of the books and pending an action for damages.

Mr. Graham for the applicant.

Mr. Rose-Innes, Q.C., for the respondent.

The Court refused the application.

The Chief Justice said: I am of opinion that this is not a case for the interference of the Court. Where a partner asks for relief from a co-partner, he must show that he himself has performed his share of the contract; in other words, he must show that he comes into court with clean hands. Mrs. Freemantle, the partner, has entirely identified herself with the acts of her husband, and if those acts cannot be justified, I do not think she is entitled to succeed. It is quite true that it was part of the

original contract that Mr. Freemantle should have equal control with the respondent of the business, but that would only be so long as he conducted himself properly, and it is perfectly clear that Mr. Freemantle, in more ways than one, has misconducted himself. He ordered goods to a large extent without the consent of Henning; he left the business for several days, locked up the place, and according to the respondent went to Burghersdorp. According to his own statement he left Mrs. Roodt in charge, but there was no evidence to show that he was justified in putting Mrs. Roodt or anybody else in his place. Nor was there any necessity for him to go to Burghersdorp to consult his attorney as he might have written to his attorney. Then there is evidence of misconduct by drink, not in one isolated case, but for days together. The respondent was quite justified in saying he would have nothing to do with him, and refusing to allow him to conduct the business of the partnership. Under these circumstances, the applicant is not entitled to an order. Of course, it is understood that if Mrs. Freemantle wishes to take her share in the partnership, and conduct it, she is entitled to do so, but she is not entitled to insist on her husband taking part in the management. For these reasons, the application must be refused with costs.

[Applicant's Attorney, G. Montgomery-Walker. Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

REGINA V. WESSELS. { 1895.
 { Jan. 14th.

Liquor Licence—Act 23 of 1883, section 75 —
Contravention—Sale without licence.

This was an appeal from a sentence passed upon the appellant by the Resident Magistrate of Caledon.

The accused, Margaretha Wilhelmina Johanna Wessels and Hendrik van Dyk, were charged with having on the 22nd November, 1894, and at Gansgat, wrongfully and unlawfully contravened section 75, Act 28 of 1883, by selling or exposing for sale a quantity of intoxicating liquor—namely, three bottles of brandy - for the sum of 3s. 9d., to one Charles Van. without having obtained a licence to do so.

The accused pleaded not guilty.

It appeared from the evidence for the prosecution that Van Dyk had 7s. 6d. money belonging to Van; that the latter asked Van Dyk if he could have three bottles of brandy, and that Van Dyk referred him to his housekeeper, the

female prisoner, who sold him three bottles of brandy for 3s. 9d., and paid him the balance of the 7s. 6d. in cash.

The female prisoner admitted that she delivered two bottles of brandy to a messenger sent by Van, but alleged that she had done so in consequence of Van's representation that he had been told by Van Dyk that he could have the brandy.

The male prisoner was acquitted, but Wessels was found guilty and sentenced to pay a fine of £10, or in default to undergo five weeks' imprisonment with hard labour.

From this sentence the present appeal was brought.

Mr. Graham was heard in support of the appeal.

Mr. Giddy, for the Crown, was not called upon.

The appeal was dismissed.

The Chief Justice said: On the evidence the Magistrate would have been quite justified in convicting the male prisoner, but that would have been no reason for acquitting the female prisoner, the appellant. Her story seems a most unlikely one. She says the man came to her and gave her 7s. 6d., out of which she kept 3s. 9d., he saying that that amount could wait a little longer. Now, it so happens that 3s. 9d. corresponds to the price of three bottles of brandy. In my opinion she sold the brandy, and there is no evidence to show that she acted under compulsion in any way. Her proper course would have been to refuse to give the brandy, but she chose to sell it, and was responsible for the act. The appeal must be dismissed.

[Appellants' Attorney, Paul de Villiers.]

Ex parte ALING.

This was a petition for an order authorising the registration of a certain ante-nuptial contract dated 11th April, 1874, which the applicant's clerk had neglected to register.

Mr. Graham was heard for the applicant.

The order was granted subject to the usual order that the applicant paid costs, without prejudice to the rights of creditors between the date of the marriage and the date of the registration.

Ex parte LAWS.

Mr. Sheil moved for an order authorising the registration of an ante-nuptial contract not tendered for registration within the prescribed time.

Order granted. The applicant to pay costs of application. Usual order as to rights of creditors.

Ex parte JANSENVILLE MUNICI- { 1895.
PALITY. { Jan. 14th.
Derelict Lands Act—Erven—Registration—
Notice.

Petition of the Members of the Jansenville Municipality, which was constituted in 1880.

On 21st January, 1854 (transfer No. 195) Petrus Jacobus Fourie became possessed of a certain piece of land called "Vergenoegd," situated in the division of Jansenville, in extent 3,000 morgen.

The estate of Fourie, who died in August, 1864, was surrendered as insolvent on 21st November, 1867.

On 10th February, 1854, Fourie sold 71 erven in Jansenville. The erven so sold have all been transferred to different purchasers at different times. Thereafter erven or lots 71 to 84 were also sold and transferred.

The erven one to eighty-four sold and transferred as aforesaid have all been deducted from the original diagram of the farm "Vergenoegd," leaving as the remaining extent 625 morgen.

On 17th March, 1869 (transfer No. 167), Henry Nuttall Chase, in his capacity as sole trustee of the insolvent estate of Fourie, transferred to P. I. Fourie, jun., and four others, certain perpetual quitrent place called "Vergenoegd" situated in the division of Uitenhage, measuring as per remaining extent 1,985 morgen 397 square roods.

The executors of Fourie (deceased) when surrendering the estate brought up in Schedule "B," being list of immovable property, the following: "Certain piece of perpetual quitrent land called 'Vergenoegd' and also piece of quitrent place called 'Nieuwfontein,' measuring together 5,000 morgen, sundry erven in the village of Jansenville unsold, eleven erven in all."

According to certain conditions of sale filed with the papers of the insolvent estate of P. I. Fourie, sen., the sole trustee sold on 18th April, 1868, to P. I. Fourie, jun., and four others the insolvent's share in the farms "Vergenoegd" and "Nieuwfontein" measuring together 5,115 morgen and 592 square roods subject to the conditions under which the Jansenville erven were sold.

The trustee in his report states: "The assets in this estate, exclusive of the cash received from the executors date £46 18s. 6d., consists entirely of landed property as undermentioned:

"1st. The remaining portions of the farm "Vergenoegd," from which the adjoining village of Jansenville has been deducted, and the adjoining farm "Nieuwfontein" measuring together about 5,000 morgen.

"2nd. Eleven erven in the village of Jansenville and one in the village of Waterford.

"According to the 9th clause of the conditions of sale, upon which the erven in Jansenville were sold, the plots marked Dutch Reformed Church Parsonage and Episcopal Church and Parsonage were reserved for the erection of the said churches in the village, and the trustee will with the consent of the creditors now convey the said erven to their respective consistories."

On the original diagram in the Surveyor-General's Office it appears that 1,014 morgen 203 square roods have been deducted, leaving a remainder of 1,985 morgen 397 square roods, which is the extent transferred to P. I. Fourie, jun., and four others on 17th March, 1869.

The petitioners alleged that it was the intention of Fourie, sen., to cut off a part measuring 1,014 morgen 203 square roods from the farm "Vergenoegd" for the purpose of dividing same into village lots, that such deduction had not been made in the Deeds Office, neither had the 1,014 morgen 195 square roods ever been transferred to a municipality or other public body; on the contrary, the erven or lots of ground sold have been deducted and transferred from the diagram of the whole farm "Vergenoegd."

The petitioners further alleged that the extent 1,014 morgen 195 square roods had for more than thirty years been used and occupied as their own *nec vi, nec clam, nec precario*, by the inhabitants of the village of Jansenville.

The prayer was for an order authorising the Registrar of Deeds to register the 1,014 morgen 195 square roods of the farm "Vergenoegd," or such portions thereof as may be found not to have been transferred from the name of P. I. Fourie, sen., in the name of the Commissioners for the time being of the Municipality of Jansenville.

Mr. Buchanan was heard in support of the application.

The Court granted a rule *nisi* returnable on the* 14th February.

The Chief Justice said: I am afraid that relief cannot be granted without some further expense in this matter. The strictly proper course would be to appoint another trustee, but if notice is given to the creditors of Petrus Jacobus Fourie, I think that will be sufficient. In addition to that notice must be given to Fourie, jun., and the four others, and ample time must be given calling upon all persons having a claim of any kind to the land mentioned in the

*On the return day the rule was made absolute. The costs to be defrayed by the applicants.

petition to appear in the Supreme Court on the* 14th February to establish their claims or be thereafter debarred. The notice to be published once in the "Government Gazette" and once each in English and Dutch in the "Uitenhage Times." The notice to be served also on all those who have proved debts of upwards of £10 on the estate of Petrus Jacobus Faure.

[Applicants' Attorneys, Messrs. Reitz and Herold.]

SUPREME COURT.

(IN CHAMBERS.)

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

REGINA V. KLAAS. { 1895.
Jan. 19th.

Mr. Justice Upington referred to this case, and said that as judge of the week it had come before him. The accused, a lad of seventeen, was convicted before the Resident Magistrate of Cape Town on two charges of theft of grapes, and was sentenced to receive fifteen lashes and to be indentured to some fit and proper person until his twenty-first year. The Magistrate had written to the revising judge that he had erred in passing the latter part of the sentence, as the prisoner was over sixteen years of age. The first part of the sentence was confirmed, there being a previous conviction against the prisoner, but the latter part was struck out.

Re NORTH-EASTERN BULTFONTEIN { 1895.
(LIMITED), IN LIQUIDATION. { Jan. 19th.
Company in liquidation—Sale of assets—
Confirmation.

Where the assets of a company in liquidation had been sold in lots, and the debenture-holders had had ample notice of the sale but had made no arrangements to purchase the assets, and the sale had been confirmed by the High Court of Griqualand, the Supreme Court refused on the application of

the debenture-holders to interfere with the discretion exercised by the High Court, or to restrain delivery of the assets to the purchasers.

This matter came before the Court on the petitions and affidavits of Messrs. J. B. Currey and A. Mosely.

It appeared from Mr. Currey's petition that the liquidator of the company recently sold by auction, subject to confirmation of the High Court of Griqualand, for about £35,000, the remaining portion of the company's assets for which he could obtain bids, leaving assets unrealised worth about £400.

On the 15th inst. the liquidator applied to the High Court for confirmation of the sale, and it was confirmed. At the hearing of the application it was opposed by the debenture-holders and by Messrs. Reiners, Von Laer & Co., creditors, for upwards of £4,000. Various other creditors supported the application, as did also the purchasers. The petitioner alleged that the sale, if finally confirmed, would cause irreparable loss and damage to the debenture-holders, and that they were desirous of appealing from the order of the High Court. That this intention to appeal was mentioned in the High Court, but that the Court refused to stay proceedings or give leave to appeal, holding that there was no appeal.

Mr. Currey went on to state that since the 2nd inst. he had been in continuous cable communication with his principals (the trustees for the debenture-holders), and knew that every effort was being made in London to form a company to take over the assets of the North-eastern Bultfontein at a higher price than that realised at the recent sale, and that he fully believed that such a company would be formed if reasonable time were granted for the purpose.

That in the event of the recent sale being confirmed, any loss resulting from delay, or even from a resale producing a smaller amount than that above referred to, would fall upon the secured creditors, all of whom he (Mr. Currey) represented, and he was prepared on their behalf to accept the responsibility of that risk.

The prayer was that any proceeding under the order of the High Court confirming the sale might be stayed pending an appeal, that leave might be granted to appeal for the order of the High Court or for alternative relief.

Mr. Alfred Mosely, a share and debenture holder of the company, alleged *inter alia* that he had taken a very prominent part in the reconstruction scheme which the Court recently decided there was no jurisdiction to accept.

*On the return day the rule was made absolute. The costs to be defrayed by the applicants.

That after this decision he came out to South Africa and was actively engaged in a further scheme for the reconstruction of the company until a very few hours before the sale of the assets commenced, and that his efforts came to nothing in consequence of the action of a small number of dissenting creditors.

That the entirety of the property mortgaged was never put up for sale as a whole, and the debenture trustees had never yet had an opportunity of expressing their willingness or otherwise to take over the assets at the total of the prices realised by the various portions, and the right to so take over the assets they were desirous of having for a reasonable time.

He corroborated the statements made by Mr. Currey, and pointed out that the claim property of the company alone was assessed by the Mining Board at the sum of £150,000.

The matter first came before Mr. Justice Upington in Chambers, but no order was made. After the failure of the latter application, notice of appeal from the original order of the High Court was given.

Mr. Searle, Q.C. (with him Mr. Molteno), now appeared in support of the application.

The Court made no order.

The Chief Justice said: In my opinion there is not sufficient evidence before the Court to justify us in restraining the delivery of the assets purchased at the recent sale. The main objection raised to the sale now is that the assets were sold in lots, and that they were not put up *en bloc*. But no request or suggestion was made to the liquidator that the assets after being sold in lots should be put up together. For months and months it was known when the sale would take place, so that the debenture-holders had ample time to make arrangements to buy the assets if they intended to do so. In August last the High Court refused to sanction the scheme of reconstruction, and in the following November the Supreme Court on appeal upheld the decision of the High Court, in the interval the debenture-holders have had sufficient time to make arrangements to purchase the assets. Mr. Mosely came from England to endeavour to carry out a further scheme of reconstruction, and as an explanation as to why the debenture-holders did not buy in the assets, he says that it was never contemplated that the scheme of reconstruction would not go through, but this is a contingency which should have been provided for. We must treat this application as though the matter came on appeal from the High Court, and there is nothing before us to justify our interfering with the discretion exercised by that Court; consequently, it would

only be raising false hopes by restraining delivery of the assets recently sold. There will be no order on the application.

Their lordships concurred,
[Applicants' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT. (IN CHAMBERS.)

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

ADMISSION.

Ex parte STONEY. } 1895.
Jan. 22nd.

Mr. Searle, Q.C., moved for the admission of Mr. William Stoney, barrister at law, as an advocate.

Mr. Stoney took the oath of allegiance, and was duly admitted, subject to the filing of the certificate of admission on its arrival from England.

GENERAL MOTIONS.

Ex parte MANAGERS FRERE } 1895.
HOSPITAL, EAST LONDON. } Jan. 22nd.

This was the petition of the Board of Managers of the Frere Hospital, East London, incorporated under the Act 6 of 1892, who as such stand and are possessed of the lands set forth in the schedule A to the Act. In terms of section 18 of the Act the petitioners gave notice to the holders of the land set forth in the schedule annexed to the petition that it was their intention to resume possession of the land and cancel the titles in consequence of the non-payment of quitrent, which is more than two years in arrear. The land is not mortgaged. The prayer was for an order authorising:

(a) The cancellation of all title deeds and sub-divisional diagrams issued in respect of the land in question.

(b) The resumption of possession and ownership of the land by the petitioners, with power to sell the same for the purposes mentioned in the original grants.

Mr. Jones for the petitioners.

As no notice of the present application appeared to have been given, the Court granted a

rule a
show
posse
shoul
able :

be effected, failing which, one publication in the "Cape Mercury."

[Petitioners' Attorneys, Messrs. Findlay & Tait.]

Ex parte FORRESTER.—*Re* THE MINORS S'ABCK.

This was an application by the tutor and by the mother of the minors for leave to raise by way of mortgage the sum of £225 to execute necessary repairs on certain houses which are to devolve upon the minors after the death of their mother. The Master reported in favour of the petition.

Mr. Sheil for the applicants.

The Court granted the order as prayed.

Ex parte EAGLE. } 1895.
} Jan. 22nd.

Petition of Charles Wm. Eagle. On 12th May, 1893, the petitioner purchased certain property in the village of Aberdeen for the benefit of and in trust for his minor son, aged ten years, for the sum of £1,475. In terms of the sale £475 had to be paid in cash, which has been paid, and the balance of the purchase price was to remain on mortgage at 6 per cent. from 1st July, 1893, interest to be payable half-yearly, the capital to be paid as follows: £200 on 1st July, 1899, and thereafter by annual instalments of £100 each, payable on 1st July in each year. The prayer was for an order authorising the petitioner to pass the bond.

Mr. Molteno for the petitioner.

The Court granted the order in terms of the Master's report that the petitioner binds himself as surety and co-principal debtor for the payment of the interest on the bond and of the instalments of the purchase price as they become due.

Ex parte TRUSTEES INFANT- } 1895.
SCHOOL, WYNBERG. } Jan. 22nd.

Petition of the trustees for the time being of the Infant-school, Wynberg. It appeared from the petition that on 9th September, 1837, and 17th July, 1838, certain land situated on the Alphen Hill, Wynberg, was granted in freehold to the Rev. Thomas Blair and others as trustees for an infant-school, with power to sell portions of the said land and devote the proceeds thereof

near the Wynberg Railway-station, on the Ottery-road, for the purpose of a Church of England Mission-school. That owing to the growth of the village of Wynberg in the direction of the railway-station, the attendance at the Infant-school gradually decreased, and as a result, the Mission-school by degrees absorbed it. That in consequence of this, the trustees for the time being determined to convert the Infant-school buildings into two cottages for the purpose of letting them. This was done, and the balance of rental, after deducting rates, was annually handed over to the rector for the purposes of the Mission-school. That in 1886 the trustees, finding it impossible to keep the cottages in repair, obtained the sanction of the Government to sell the same, with the result that a sum of £480 was left in the hands of the trustees after paying off certain liabilities. That the interest on the said £480 has until lately been handed to the rector of St. John's, Wynberg, for the purposes of the Mission-school, the sum now in the hands of the trustees being £525, which has been placed in the Government Savings Bank at 3½, now 3¼, interest. That the Mission-school is at present in a very neglected and dilapidated condition, and that it is of the utmost importance that immediate funds be obtained to reconstruct the same, so as to entitle the school to receive educational grant. That the petitioners were informed by the trustees of the Diocese of Cape Town, in whom the school is at present vested, that they are unable to raise any money on mortgage of the school. That in consequence of this the scheme of reconstruction is at present at a standstill, and although a sum of £545 has been already collected or promised towards the necessary expenditure, it is calculated that a sum of £1,100 will have to be spent to put the buildings in proper repair and maintain the grant from the Educational Department.

The petitioners alleged that they were anxious to help the Mission-school, and that as their trust in the Mission-school had virtually ceased, they were willing, with the sanction of the Court, to transfer the sum of £525 now in their hands to the Managing Committee of the Mission-school, to be devoted by the committee to the reconstruction of the Mission-school, which has virtually taken the place of the Infant-school. That the petitioners had every reason to believe that the Managing Committee are prepared to

* On the return day the rule was made absolute.

accept the transfer of the said amount and to enter upon the work of reconstruction at once. That the petitioners had approached Government upon the subject of the transfer and that whilst the Government offered no objection to the proposal, they advised the petitioners to apply to the Court. (Letter from Under Secretary for Agriculture annexed.) The prayer was for an order authorising the petitioners to transfer the sum of £525, or such other sum as may be in their hands, belonging to the trust account of the Infant-school at Wynberg to that of the Managing Committee in trust for the time being of the Church of England Mission-school, Ottery-road, Wynberg, to be devoted by them to the reconstruction and improvement of the Mission-school buildings according to the prepared plans and specifications.

One of the trustees of the Mission-school filed an affidavit in which he expressed his willingness to accept the funds for the purposes detailed in the petition.

Mr. Searle, Q.C., was heard in support of the application.

The Chief Justice said: My only difficulty in granting the order is that the Infant-school is wholly undenominational, and the Mission-school is not wholly so; although, however, children of all denominations attend it, still it is a denominational mission-school. Under these circumstances I think it well that an opportunity should be given to anyone of the public interested in it to oppose this application. Under these circumstances, it is better to give a rule *nisi** calling on all persons interested to show cause why the relief asked for should not be granted; the rule to be advertised once in the "Cape Times" and once in the "Cape Argus," the costs to come out of the funds in the hands of the trustees.

[Petitioners' Attorney, D. Tennant, jun.]

* On the return day the rule was made absolute.
R&P.

SUPREME COURT. (IN CHAMBERS.)

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

Re A. DICKSON AND CO., LIMITED. { 1895.
Jan. 24th.

This was an application for an order placing the said company under the operation of the winding-up clauses of the Companies Act, 1892, by reason of its inability to satisfy its debts.

Mr. Searle, Q.C., for the applicants (the African Banking Corporation), said they had received information by cable that negotiations were pending in England with a view to obviating liquidation, and they had expected to hear the result that morning, but no cable had arrived. He asked that the matter should be postponed until the next sitting of the Court, as there might then be no necessity for the application.

Mr. Innes, Q.C., for the respondents, said he had no objection to a postponement, because his clients were desirous to avoid liquidation.

The matter was postponed until the first day of next term.

Re ANTE-NUPTIAL CONTRACT HOUGH { 1895.
AND DU PLESSIS. { Jan. 24th.

This was an application for the confirmation and registration of an ante-nuptial contract executed on 8th December, 1894, between Johannes Hendrik Hough and Christina Wilhelmina du Plessis, but not tendered for registration within the period prescribed by law. The facts are these: At the execution of the contract, Christina Wilhelmina du Plessis, who is a minor, was assisted by her brother-in-law, one Vermeulen, with whom she had lived for years, and who was generally considered to be her guardian. After the marriage, the notary before whom the contract was executed discovered that one Du Plessis, and not Vermeulen, was the guardian, and he now alleged that the delay in tendering the contract for registration was occasioned in obtaining the guardian's consent to the marriage, and his ratification of the contract. An affidavit was filed by the guardian, consenting to the marriage, and confirming the contract.

Mr. Sheil was heard in support of the application.

The Court ordered the contract to be registered, the affidavit of Du Plessis, the guardian, to be filed with the order.

ROSS V. FARMER.

{ 1895.
Jan. 24th.

Attachment—Goods—Security for costs.

Mr. Molteno applied for an order for the attachment of the person or the goods of the respondent, A. W. Farmer, who until recently had carried on business in Church-street, Cape Town, selling American editions of English and other authors. The affidavits set forth that a rule nisi had been obtained requiring the respondent to give security for costs in an action pending against the respondent, in which £20 was claimed as damages for slander, and £16 as damages in lieu of notice. The order had been made absolute, and had been served upon the respondent, who replied that he had no effects. The affidavits further stated that the respondent had done a lucrative trade in Cape Town, and had taken considerable sums of money over the counter, that he had seventy-one cases of books, valued at £1,500, on board the S.S. Eiffel Tower, now at East London, and a valuable consignment of watches by the R.M.S. Moor. The application was that goods to the value of £100 should be attached as security for costs.

Mr. Justice Upington: You have lately sued Farmer in the Magistrate's Court, and to the summons an exception was taken which was upheld?

Mr. Molteno: An appeal has been noted from the Magistrate's decision. The exception was that as there were two actions, one for £16 wages and the other for £20 damages for slander, the actions had been split. There was abundant authority to show that the exception was bad and they had appealed from the judgment. It was for the benefit of Farmer that the two actions were taken in the Magistrate's Court, so that he should not be detained in Cape Town. It was clear that he had got ample property.

The Chief Justice: Whose books are they?

Mr. Molteno: The defendant's.

The Chief Justice: Is he not an agent?

Mr. Molteno: No, he was doing business on his own account. The affidavit states that the watches are his also.

Mr. Justice Upington said that if he knew that the plaintiff was going to sue in the Magistrate's Court for £20 damages for slander and £16 in lieu of notice he should have hesitated in making the order for security for costs.

The Chief Justice: If there had not been a rule we would hesitate to make an order. It seems a very paltry thing to attach a man's personal belongings in this manner. But the

rule has been granted and it must be obeyed in some form or other. I should think that two cases of books would be enough.

Mr. Molteno suggested an order for the attachment of goods to the value of £100.

Mr. Justice Upington expressed his regret at having granted the rule nisi under the circumstances now disclosed.

Mr. Molteno said the rule had been subsequently made absolute by the full Court.

An order was granted attaching goods, the property of the defendant on board the Eiffel Tower or elsewhere, to the value of £60 as security for the applicant's costs.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

REGINA V. SYM. { 1895.
Feb. 1st.

Theft—Remittal—Review.

Where a prisoner, charged on two counts (1) with contravening Act 35 of 1893, section 25, and (2) with theft, pleaded guilty, and the case was remitted by the Attorney-General for trial on the charge of theft only, and the Magistrate tried the prisoner on both counts, found him guilty, and sentenced him to a term of imprisonment on each charge, the Court on review quashed the conviction on the first charge.

This case came before the Chief Justice, as judge of the week, on review from the R.M. of Sutherland.

The prisoner was charged (1) with contravening Act 35 of 1893, section 25, in that he entered an enclosure with intent to steal an ostrich, and (2), with stealing the ostrich.

The prisoner pleaded guilty. The Attorney-General remitted the case for trial on the charge of theft only. The Magistrate however tried the prisoner on both counts, found him guilty, and sentenced him to six months' imprisonment with hard labour on the first count and twelve months' imprisonment with hard labour on the second count.

Mr. Giddy for the Crown: The Attorney-General is not prepared to support the conviction on the first count.

The Chief Justice said: It is quite clear that the conviction on the first count cannot be sustained. Even if the remittal had been on both charges, the charge of theft, in my opinion, includes that of entering into the enclosed premises for the purpose of committing the theft. The conviction on the first count must be quashed.

Mr. Justice Buchanan concurred.

Mr. Justice Upington: I also concur. The Attorney-General having remitted only the charge of theft appears to have thought that the Magistrate would have understood that such charge was alone to have been dealt with.

PROVISIONAL ROLL.

VAN BROEMTSEN V. ORCHARD. { 1895.
Feb. 1st.

Mr. Buchanan applied for the final adjudication of defendant's estate.
Granted.

VAN BYN COMPANY V. BOTES.

Mr. Molteno moved for provisional judgment for the sum of £27 15s. 6d., with interest at 8 per cent.

The Court granted provisional judgment with interest at 6 per cent., the legal rate.

THWAITS V. BRAND.

Mr. Graham moved for provisional sentence for the sum of £490, less £255 3s. 8d. paid on account.

Granted.

STOCKDALE V. VAN ZYL AND ANOTHER.

Mr. Maskew moved for provisional judgment for the sum of £350.

Granted.

TRUTER V. TRUTER.

Mr. Sheil moved for judgment for the sum of £163 10s., less £36 10s., and also prayed that certain funds in the Kimberley branch of the Standard Bank standing to the credit of the defendant be made executable.

Order granted.

LOUW V. KUPKE.

Mr. Shippard moved for judgment for the sum of £195 6s. 7d., with interest.

Granted.

SEARLE AND SONS V. HORSFALL.

Mr. Castens moved for judgment for the sum of £44 7s. 3d., less £10 4s. paid on account.

Granted.

REHABILITATIONS.

Mr. Benjamin moved for the rehabilitation of Frederick Hendrik van Thiel Berghuis.

Granted.

Mr. Maskew moved for the rehabilitation of Isaac Horak de Villiers.

Granted.

Mr. Tredgold moved for the rehabilitation of John Nicholas Botha.

Granted.

Mr. Maskew moved for the rehabilitation of Frederick Louis van Eyssen.

Granted.

Mr. Buchanan moved for the rehabilitation of Abraham Stephanus van Straaten.

Granted.

FURNIVALL V. CORNWELL'S EXECUTORS. { 1895.
Feb. 1st.
„ 4th.

Usufruct—Mutual will—Security—Minors—Administrators—Re-marriage of surviving spouse.

Husband and wife, married in community, by mutual will reciprocally bequeathed to the survivor the life usufruct of their joint estate, and appointed the children of the marriage as heirs of such estate subject to the usufruct.

The testator appointed the respondents as executors of his will, administrators of his estate and, in the event of the wife's marrying again, guardians of his minor heirs.

The testator died first and some years afterwards the survivor, the applicant, married again, whereupon the respondents claimed the sole control and administration of the joint estate.

Held that, although the applicant might be liable to give security against misappropriation or waste, she was entitled, as usufructuary, to the control and administration of the joint estate.

This was an application on notice to the respondents (William Bradford Cornwell and George William Steytler, in their capacity as the testamentary and assumed executors respectively of the late George Thomas Cornwell, the applicant's first husband) that they would be required to show cause why it should not be declared that the applicant is entitled to have and take into her possession, custody, and control the property and estate disposed of by the mutual last will of herself and her said late husband George Thomas Cornwell, and to have the entire usufruct and enjoyment thereof in terms of the said will dated 6th April, 1880, and why they should not

be restrained from interfering with her in that behalf and also why they should not be ordered to pay the costs of this application.

The will bequeathed to the survivor the entire usufruct and enjoyment of the estate of what nature soever, both movable and immovable, which might be left at the death of the first dying for and during the lifetime of such survivor, after whose death the estate was to descend as in the will provided.

The testators then appointed their children, the lawful issue of their marriage, already born or still to be begotten, their heirs of all their property, estate, and effects of what nature soever, without any exception, subject however to the usufruct aforesaid.

The testator appointed his father William Daniel Cornwell and his brother William Bradford Cornwell executors of his will and administrators of his estate and effects, and in the event of his wife remarrying, guardians of his minor children, should she not however remarry then she was to remain their guardian.

The testatrix appointed her husband to be the executor of her will and administrator of her estate, both the testators giving and granting to their executors all such powers as are required or allowed by law and especially the power of assumption.

The testator died on the 19th August, 1888. The respondent Cornwell is the surviving executor testamentary and the respondent Steytler is the executor assumed by him.

The estate consists of certain buildings and offices in St. George's-street, Cape Town, two houses in Buitenkant-street, Cape Town, a house at Green Point, shares in certain companies, the sum of £1,500 or thereabouts in Cape Government Stock, and of various other things not necessary to be detailed.

In terms of the will the applicant at first enjoyed the usufruct of the property, letting the same to tenants and taking the control thereof into her own hands, with the knowledge and consent of the executor William Bradford Cornwell.

Thereafter the applicant married her present husband, Harry Johnson Furnivall, after which date Mr. Steytler was assumed as executor to the estate.

The executors now contended that they were entitled to control and deal with the estate, and that the applicant's right was limited to receiving from them the rents and profits thereof after deduction of the usual commission.

The applicant alleged that they had taken upon themselves, without her authority, to let the landed property, to collect the rents thereof, to repair the same, and to pay premiums of

insurance thereon, although she had given notice to the tenants that all rents should be paid to her, and although she was taking due care that the premises were properly repaired and duly insured.

That one of the houses, "Blockroad Villa" at Green Point, was occupied by her, but that if the contention of the respondents was correct there was nothing to prevent them from ejecting her and letting the same and paying her the rent.

She maintained that the action of the respondents was not warranted by the terms of the will and was contrary to law.

The first-named respondent in his answering affidavit deposed that the applicant married her present husband in June, 1894, and that in July, 1894, he (respondent) assumed Mr. Steytler as executor, giving the applicant notice that the estate would be managed and controlled in future by the executors, who would charge for this management, for collecting the rents and keeping the property in repair, and for paying the rates, two-and-a-half per cent. on all moneys passing through their hands, paying the balance to the applicant. That the deponent adopted this course in the interests of the minor children of his late brother, who were the heirs under the will, and that he deemed it his duty, as the widow had remarried, to see that the estate did not deteriorate in any way, but should pass to the children eventually after the death of the usufructuary in the same state in which it was left at the death of the testator.

That the usufruct derivable from the estate and payable to the applicant was about £900 a year.

That the deponent was informed and verily believed that, in spite of the usufruct of £900 a year, the applicant did in June, 1893, arrange for an overdraft with her bankers to pay the rates on the property, and in June, 1894, was again arranging for an overdraft for the same purpose.

That the testator left at his death four children, of whom the eldest is about seventeen years of age and the youngest about seven.

There was a replying affidavit from the applicant, explaining how it was that she was obliged to overdraw her account and stating that the estate had been well looked after while it was in her possession.

Mr. Rose-Innes, Q.C., was heard in support of the application, and as to the common law rights of a usufructuary cited *Voet* (7, 1, 32, 36, 37, 41 and 7, 6, 4); *Grotius* (2, 89, 3) and *Van der Kessel* (Th. 371). He also referred to

Hiddingh's Case (3 Juta, 441); *Re Best* (2 Sheil, 377; 9 Juta, 488); *Meyrs v. Meyrs* (1 Juta, 377).

Mr. Searle, Q.C., for the respondent: The first respondent was appointed not only executor but also administrator, and in case of the wife's remarriage he was appointed guardian of the minors.

The terms of the will show that the testators were anxious for their children's benefit, and that they should receive the whole estate subject only to the survivor's life interest.

If the applicant left the property in a neglected and dilapidated state the executors and administrators might be held liable to the heirs when the latter came into the inheritance. The respondents therefore must have some control. The fact of the guardianship being taken away from the survivor in case of her remarriage and given to the administrators shows that the testators wished the latter to exercise some control. The applicant appears to be wasteful, as notwithstanding the fact of her receiving £900 she has on two occasions at least overdrawn her account. In an application of this kind the applicant must show that she has done all she could to protect the interests of the minors.

As to the rights of trustees and administrators, see *De Montmort v. Board of Executors* (2 Juta, 69).

Mr. Rose-Innes, Q.C., in reply.

Curia ad vult.

Postea (February 4th) the Court delivered judgment.

The Chief Justice said: By the last will of George Cornwell and his wife (the applicant), the testators reciprocally bequeathed to the survivor the life usufruct of their joint estate and appointed their children as heirs of such estate, subject to the usufruct. The testator appointed his father and brother as executors of his will, administrators of his estate, and, in the event of his wife's marrying again, guardians of his minor heirs, but directed that she should be the guardian so long as she remained a widow. She, on her part, appointed her husband executor of her will and administrator of her estate. The husband died first, and the wife was allowed by the executors to have the sole control of the estate left after payment of all debts. The estate consists of houses, Government Stock, and shares in public companies, and the applicant let the houses and received the rent, interest, and dividends as they accrued until June, 1894, when she married again. The executors maintain that, since such remarriage, they are entitled to manage and control the joint estate in order to protect

the interests of the minors whose guardians they have become. The object of the present application is to have it declared that the applicant is entitled to the possession, custody, and control of the joint estate of which she has the life usufruct, and to restrain the respondents from interfering with her rights of control. The first observation I would make is that the remarriage of the applicant does not, under the will, confer on the respondents greater rights of administration than they had before the applicant married again. The effect of her remarriage is to deprive her of the guardianship of her children and to vest it in the respondents. As guardians the respondents are of course entitled, nay bound, to protect the rights of the minors, but that protection must be afforded in a regular way and not by the assumption of an authority which is not legally committed to them. If they are not entitled to the actual control of the property, they have other means of effectually protecting the minors. They may guard against the risk of misappropriation or waste by demanding security from the usufructuary, but no such demand has been made in the present case. What the respondents claim is that they should act as trustees for the usufructuary and heirs, and receive a commission upon all sums received by them by way of rent, interest, dividends, or otherwise. I am not prepared to say that it would have been impossible for the testators to deprive the survivor, after adiation, of the right to administer the joint estate, although entitled to the life usufruct. If the respondents had been appointed administrators of the joint estate, that circumstance would have afforded a strong indication of the testator's desire that the survivor should be deprived of the ordinary rights of a usufructuary in regard to the control of the property, of which she is entitled to the rents and profits. But her rights of control as usufructuary are so clearly recognised by all the authorities that nothing short of the clearest indication to the contrary can deprive her of it. The will in question appoints the respondents as administrators of the husband's estate only. The property of which the applicant has the usufruct is the whole of the joint estate. That estate is to devolve unimpaired upon the children of the testators on the termination of the applicant's life usufruct, and there is no provision for a division of the joint estate during the interval. The only way in which effect could possibly be given to the words appointing the respondents as administrators of the husband's estate would be by holding that they are trustees of half the joint estate, and that, as to the

other half, the applicant is free from their control, but such an arrangement would be quite unworkable and cannot therefore be deemed to have been contemplated. The question is not free from difficulty, but, upon the whole, I have come to the conclusion that the applicant did not intend, by being a party to the mutual will in question, to deprive herself of the ordinary rights of a usufructuary. She has deprived herself of the right, after adiation, to claim one-half of the joint estate as her absolute property, but, on the other hand, she has acquired the right to administer, during her lifetime, the whole of the joint estate in order to the due enjoyment of her life usufruct. The application must therefore be granted, with costs, without prejudice to any claim the respondents may have to claim security on behalf of her minor children.

Their lordships concurred.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondents' Attorneys, Messrs. Van Zyl & Buissinné.]

Ex parte SMITH.—*Re* TITTERTON'S { 1895.
ESTATE. } Feb. 1st.

Assumption, substitution, and surrogation—
Executors—Letters of administration—
Ordinance No. 104.

The substitution and surrogation of executors have been put an end to by Ordinance No. 104.

Application to authorise and require the Master of the Supreme Court to issue letters of administration in favour of a surrogated executor refused.

This matter came before the Court on notice of motion to the Master that he would be called upon to show cause why he should not be ordered to grant letters of administration to the applicant as executor testamentary in the estate of the late William Titterton.

The facts set forth in the petition were as follows :

By the mutual last will and testament of the late William Titterton, of Kraga Kama, and his wife Elizabeth Titterton (born Parkin), dated 9th February, 1852, the survivor of them together with Iasiah Titterton and William Parkin, of Port Elizabeth, were appointed executors of the will, administrators of the estate and guardians of the minor children of the testators, *with full power of assumption, substitution and surrogation.*

Subsequently by a codicil to the will the testators revoked the appointment of the

executors as far as the said Titterton and Parkin were concerned, and appointed in their place William Minett Frames to be executor jointly with the survivor.

By a further codicil dated 30th October, 1886, the appointment of Frames as executor was revoked, and the survivor was left as the sole executrix.

Elizabeth Titterton survived her husband and took out letters of administration as executrix testamentary.

On 12th May, 1886, the survivor Elizabeth Titterton executed her last will disposing of her share of the joint estate, and *inter alia* appointing Charles P. W. Mouat and William B. Frames to be executors of her will and administrators of her estate and also of the joint estate of herself and deceased husband.

By a codicil to her last will dated 22nd September, 1892, Elizabeth Titterton revoked the appointment of Mouat and Frames as executors of her will and administrators of her estate, and also the appointment in the joint estate of herself and deceased husband, and nominated in their place the petitioner in his capacity as the secretary of the Aegis Assurance and Trust Company of Port Elizabeth (Limited), and the secretary of that company for the time being to be the executor and administrator of her estate, and also by virtue of the power of surrogation granted to her in the mutual will of herself and predeceased husband, she nominated the petitioner executor and administrator of the joint estate of herself and predeceased husband.

Elizabeth Titterton died on 1st January, 1895, and the petitioner filed the will and death notice with the Magistrate at Port Elizabeth.

The petitioner applied to the Master for his appointment as executor in the estate of the late Elizabeth Titterton, and also for his appointment as executor in the estate of the late William Titterton.

The Master granted letters of administration to the petitioner as executor testamentary in the estate of the late Elizabeth Titterton, but declined to grant the petitioner letters as executor testamentary in William Titterton's estate.

Under these circumstances the petitioner prayed for an order authorising and compelling the Master to grant letters of administration as executor testamentary in the estate of the late William Titterton by virtue of the appointment made in the codicil to the last will of the late Elizabeth Titterton, dated 22nd September, 1892, or for other relief, and that the costs might be ordered to come out of William Titterton's estate.

The position taken up by the Master was that as the Ordinance only deals with the appointment of executors testamentary, dative and assumed, our law recognises no such person as a surrogated executor.

Mr. Rose-Innes, Q.C., in support of the application: It is clear that under the common law of Holland executors and guardians who had the power of surrogation could appoint others to act in their places after their death; *Van der Linden* (p. 41). A form is also found in *Van Alphen* (Vol. 11., p. 607); also *Tennant's Manual* (p. 328), although at page 142 he says that the substitution and surrogation of an executor or tutor have virtually ceased to have effect. But see Schedule 12 of the repealed Act 3 of 1864.

The Master takes up the position that as only three classes of executors are recognised by Ordinance 104 he cannot issue letters to any others. Special provision is made with regard to assumed executors (section 24) and see section 19. But the Ordinance does not deal with assumed executors as a *class*, they are all either testamentary or dative (Schedule "B"). And by section 37 the law is left unchanged in the absence of express repeal. There is no express repeal here, therefore the old law stands. The question is not one of policy, because virtually the same thing can be effected in another way. An executor may assume another. That other may take out no letters but after the death of the original executor he may apply for letters, and is practically a surrogated executor in everything but name. See *De Korte v. Hofmeyr* (1 Juta, 306).

The application was refused.

The Chief Justice said: This case illustrates how questions of law may crop up which the profession has long regarded as being finally settled. For myself, I have always assumed that the substitution and surrogation of executors were put an end to by Ordinance No 104, and this view was expressed by Tennant in his book on Notarial Practice as far back as 1844. That is no reason why full consideration should not be given to Mr. Innes's argument in favour of the contrary view, but, after again reading the 19th and 24th sections of the Ordinance, the conclusion appears to me inevitable that the Court can no longer give effect to the substitution and surrogation of executors. The only indirect mode of appointing executors recognised by the Ordinance is that of "assumption." The 19th section of the Ordinance enacts that the estates of all persons shall be administered by virtue of letters of administration to be granted by the Master to executors testamentary and dative "in manner

hereinafter mentioned," and nowhere in the remaining sections of the Ordinance is any reference made to substituted or surrogated executors. The omission is significant when we find express provisions for the assumption of executors, a mode of appointing executors which, in works on the Roman-Dutch law, is always treated in connection with the two other indirect modes of appointment. The 24th section enacts that nothing in the Ordinance contained shall prevent any testamentary executor from assuming any other person as executor under any power for that purpose committed to him by the testator. The section proceeds to direct that an assumed executor shall not act without obtaining letters of administration, and that all the provisions relating to executors dative shall apply to assumed executors. One of these provisions is that he shall give security for due administration, and if Mr. Innes's contention were correct there would be this anomaly: that a person assumed and appointed to act with the executor testamentary is to give security but a person surrogated to act alone is free from any such obligation. I am clearly of opinion that the Master is not bound to issue letters of administration in favour of the surrogated executor, and that this application must be refused, with costs out of Mrs. Titterton's estate.

Mr. Justice Buchanan concurred on the same grounds. The appointment of an assumed executor, even after the death of the original executor, was not of such moment, as the law provided that the assumed executor should in all cases give security. It virtually placed him in the same position as an executor dative.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné.]

MASON V. MASON. { 1895.
Feb. 1st.

This was an action for restitution of conjugal rights, instituted by the plaintiff against defendant, on the grounds of malicious desertion.

Mr. Molteno for the plaintiff
Defendant in default.

Mr. Norman Lacy gave formal evidence of the marriage of the parties.

Mary Ann Emma Elizabeth Mason, plaintiff, said that she was married at Wynberg to the defendant, John William Mason, on January 20, 1885. She still lived at Wynberg with her mother. Her husband was a confectioner. Four months after the marriage they went to Kimberley and lived there happily for three years, when the home was broken up and her husband went to Johannesburg, sending her back to Wynberg. While there she heard that her

husband had been arrested in the Free State for theft. He was subsequently sentenced to eighteen months' imprisonment. He escaped from prison and returned to Wynberg four years ago, but was arrested again. Had not heard of him since then. She had ascertained that he again escaped from prison, and that there was a warrant of arrest out against him. There were three children, and she supported herself and her children by dressmaking. Was married in community of property, and she prayed for a forfeiture. She had ascertained from the police that there was a charge of murder against the defendant in the Transvaal, and that he had disappeared.

Order granted for restitution of conjugal rights, returnable on 31st March, failing which respondent to show cause on the 12th April why a decree of divorce should not be granted, with forfeiture of benefits by virtue of the marriage in community of property, plaintiff to have the custody of the children, publication to be as before.

IN THE ESTATE OF THE LATE IGNATIUS S. FERREIRA.

Mr. Graham moved to make absolute the rule *nisi* issued under the Titles' Registration and District Lands Act, for registration in the name of the said estate of the remaining extent of the perpetual quit-rent place, Geelhoutboom, in the district of Humansdorp, omitted in error from the subdivisional transfer in 1885.

Order granted.

THE PETITION OF ANNA HUMPHRIES.

Mr. Graham moved for authority to petitioner to cancel the sale of certain farm, known as Eland's Rivier Poort, to her minor children by her first husband, and to take transfer thereof into her own name, with power to sell or mortgage the same, and execute all necessary deeds without the assistance of her present husband, from whom she is living apart.

Order granted for the cancellation of the sale, as the purchasers consent to it, and authorising the petitioner, as the executrix, and the executors of the first husband's estate to raise on mortgage the sum of £1,350 for the purpose of paying six of the children the moneys due to them out of the estate, the costs of the mortgage, and of this application.

DA SILVA V. DA SILVA.

Mr. Jones moved to make absolute the rule *nisi* for dissolution of the marriage sub-

sisting between the parties by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights, and for a declaration that applicant is entitled to the custody of the minor child and a monthly payment towards its maintenance.

Order granted.

PRETORIUS V. GREEF.

This was an application by the respondent to set aside certain order obtained by applicant on the 29th November last, whereby the printing plant and apparatus on respondent's premises at Britstown were placed under attachment pending an action for recovery of rent due in respect of the said premises.

Mr. Searle for the applicant.

Mr. Sheil, for the respondent, applied for a postponement on account of the illness of the respondent, and the case was adjourned *sine die*, not later than the last day of term.

MALCOLM'S TRUSTEE V. HAASE, VAUGHAN AND CO.

Application by the defendants to set aside certain judgment obtained by plaintiff on the 1st August last, under the 329th rule of Court, and for leave to enter appearance and to defend the action.

Mr. Sheil for the applicants.

Mr. Benjamin, for the respondent, applied for a postponement on the ground that he had been instructed only that morning.

The case was postponed till Monday.

IN THE INSOLVENT ESTATE OF DANIEL V. R. ENGELS.

For the appointment of a provisional trustee to the said estate with power to carry on the business of the insolvent and to collect outstanding debts.

Order granted, appointing Mr. Reed provisional trustee.

THE MASTER V. PRINS' EXECUTOR.

For an order for the personal attachment of the respondent for contempt of court by reason of his failure to file an account of his administration and distribution of the estate of the late Regina Prins, as directed by judgment, dated the 29th November last, so to do.

Order granted.

IN THE ESTATE OF THE LATE ADAM T. BURDETT.

Mr. Watermeyer applied for an order for the removal from his office as one of the

executors of the said estate of Thomas G. Sheard, by reason of the sequestration as insolvent of his estate, and his departure from the Colony.

Order granted.

DICKSON V. DICKSON.

Mr. Watermeyer applied for extension of the return day of the citation issued by applicant in the proceedings instituted by him in an action against his wife for restitution of conjugal rights, failing which for divorce, by reason of her malicious desertion.

The order was granted.

MCCRATH V. MCCRATH.

Mr. Molteno moved to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties, by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights, and for a declaration that the applicant is entitled to the custody of the minor child of the marriage.

Order granted.

SMITH V. SMITH.

Mr. Shell applied for extension of the return day of the rule *nisi* requiring respondent to show cause why applicant, his wife, shall not be admitted to sue him *in forma pauperis* in an action for restitution of conjugal rights, failing which for divorce.

Order granted, extending the return day to first day of next term.

DAY V. DAY.

In this suit, in which the husband sues his wife for restitution of conjugal rights, failing which for divorce, Mr. McLachlan applied that the service of the summons should be considered sufficient.

The Chief Justice said that he had received a letter from the wife in England stating that she left her husband owing to his violence; that she was willing to return to her husband, but had not the means. When the case came on, therefore, these facts would be borne in mind.

Re SLEBUSCH.

Mr. Graham moved for the appointment of a *curator ad litem* to protect the interests of the minor in the partition of certain farms.

The Court made an order similar to that made *In re Campher* (5 Juta, 75), and appointed Mr. Schweitzer *curator ad litem*.

REGINA V. WILLIAMS. { 1895.
Feb. 1st.

Liquor licence Act 28 of 1883, section 89—
No proof of prohibition.

W. was charged with and convicted of contravening Act 28 of 1883, section 89, in that he sold liquor to one H., to whom the sale of liquor had been forbidden for a period of twelve months under the 89th section.

No proof was produced at the trial that H had been forbidden liquor, nor was there any evidence to show that W. had any knowledge of the prohibition.

On appeal the conviction was quashed.

This was an appeal from a sentence passed upon the appellant by the Resident Magistrate of Willowmore. The accused was charged with the crime of contravening section 89, Act 28 of 1883, in that he did on or about the 20th day of December, 1894, wrongfully and unlawfully supply or cause to be supplied to one Michael Hendrik, of Willowmore, a certain quantity of Cape brandy or other intoxicating liquor, to wit, "one liquor," or thereabouts, to the said Michael Hendrik, well knowing at the time that the supply of intoxicating liquor to the said Michael Hendrik had been prohibited by an order of the Court of the Resident Magistrate of Willowmore for the period of twelve months from 9th March, 1894. There was nothing on the record to connect Williams with the offence further than the charge in the charge-sheet. There was no proof that Hendrik had been prohibited by an order of Court. The Magistrate's order was not produced, nor was there any evidence given as to the prohibition, further than one statement made in cross-examination that Hendrik's liquor had been stopped, but no proof was given that the accused had any knowledge of the prohibition.

The accused was found guilty, and sentenced to pay a fine of £3, or in default one month's imprisonment with hard labour.

From this sentence the accused now appealed.

Mr. Searle, Q.C., was heard in support of the appeal.

Mr. Giddy, for the Crown, said that he was not in a position to support the conviction.

The conviction was quashed.

The Chief Justice said: It is much to be regretted that the evidence in this case was submitted in such a loose manner. This 89th section contains one of the most wholesome provisions of the Liquor Licensing Act, and I am

afraid that its provisions are almost a dead letter; and now that there is a conviction the Court is compelled to quash it owing to the loose way in which the evidence was brought forward. There is no evidence whatever that there was a prohibition. The Act says that there shall be an order of prohibition in writing, and the production of such an order would be the best evidence of prohibition. There is further no evidence that Williams had knowledge of the prohibition. The conviction must be quashed.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buismanné.]

REGINA V. WARE. { 1895.
Feb. 1st.

Proclamation 343 of 1894—Sale of liquor without a licence—Conviction—Partnership—Servants.

In January, 1894, a liquor licence was granted to B., who at that date carried on business at the Royal Hotel, Kokstad.

In the following November, B. left the Colony. Before B. left he handed the business over to A., whom he had taken into partnership some time previously.

On the 29th November, A. applied for a transfer of the licence to him and it was transferred on the 6th December.

On the 2nd December, W., who was in B's service before he left the Colony, and who remained in A's service after B's departure, was charged with and convicted of selling liquor without a licence in contravention of the Proclamation 343 of 1894, section 10.

Held on appeal, that although the evidence would have been sufficient to justify W's conviction for contravening the 4th and 5th sections of the Proclamation, his conviction under the 10th section was wrong, as W. was authorised by A. to sell liquor under the licence granted to his partner B.

This was an appeal from a sentence passed upon the appellant by the Resident Magistrate of Kokstad.

The appellant was charged with the crime of contravening section 10, Proclamation 343 of 1894, in that upon or about the 2nd day of December, 1894, and at or near the Royal Hotel, Kokstad, the said James W. Ware did wrongfully and unlawfully sell, deal, or dispose of

intoxicating liquor, to wit, half a bottle of brandy and one glass of brandy, to one Masende without a licence as by law provided.

The prisoner pleaded not guilty.

Sections 4, 5 and 10 of the Proclamation are as follows :

4. The said licences shall authorise the sale of intoxicating liquor, in any quantity, on the premises to be specified in such licence, between the hours of eight o'clock in the morning and six o'clock in the evening, on any day other than Sunday, Good Friday, and Christmas Day : provided that in the case of licensed premises situate at any seat of magistracy, any person authorised under section 2 to issue a licence may extend the above hours to eleven o'clock in the evening, subject to such conditions and restrictions as may be deemed reasonable in the special circumstances of the case.

5. No intoxicating liquor shall be sold, given, supplied or delivered by the holder, of any such licence to any native unless he shall produce a permit signed by a magistrate authorising the bearer to obtain a specified quantity of such intoxicating liquor.

10. Any person who shall, contrary to these regulations, sell, deal, or dispose of intoxicating liquor without a licence, or who, being a holder of a licence, shall sell or offer, or expose for sale or deal, in any such liquor at any place other than the place where he is authorised by his licence to deal in such liquor, or during any time when he is not authorised so to deal, or in violation of any condition of his licence imposed under section 4, shall be liable upon conviction before the magistrate of the district in which the offence is committed, to a penalty not exceeding £50, or in default of payment to imprisonment, with or without hard labour, for a period not exceeding six months.

Ware, and several witnesses who were called for the defence, denied that he had sold the brandy to Masende on the day in question. There was evidence to show that Anderson, the present lessee of the Royal Hotel, applied for a transfer of the licence to his own name on the 29th November and that the licence was transferred on 6th December. The further facts appear from the Magistrate's reasons, which were as follows :

In this case accused has been charged under the provisions of Proclamation No. 243 of 1894, with selling liquor at the Royal Hotel, Kokstad, without a licence.

It would appear that a licence was granted to Mark Blow in January, 1894, but in November last Blow quitted the Cape Colony with the intention of not returning. Before leaving he handed over the business at the Royal Hotel

to one Anderson, whom he had taken into partnership some time previously. The licence was not however transferred to Anderson until 6th December (four days after the alleged sale by accused), and consequently the sale of liquor, during the interval between Blow's departure and the transfer of the licence, would practically be without a licence.

As regards the question of fact as to whether accused sold the liquor or not I may say that I believe the evidence of Masende, J. Christian and Demmer, witnesses for the prosecution, on this point. It is true there is a slight discrepancy between Masende's statement and Christian's as to where the bottle of liquor was handed over to Demmer, but I do not think this affects Masende's credibility, as I am satisfied he did not understand the distinction between the terms "office and house." The Chief Constable (Demmer, to whom the liquor was handed at his house by Christian after the latter had received it from Masende, who was employed by Christian to trap Ware. —*Rep.*) being an official any place he occupied would not unreasonably be regarded as his office by an ignorant native, who cannot be expected to know the difference between an office and a house. The term office is a familiar word to natives and they always associate it with officials.

In my opinion the evidence of accused is not worthy of credit. He states that he left the Royal Hotel at 9.30 a.m. and went to church with his wife, but in this statement he is not borne out by his witness Lehman.

Lehman states moreover that he was twice there (meaning the Royal) on the day in question, viz., in the morning and before dinner time. As for the native witnesses for the defence, I do not believe their evidence. It is very remarkable that they could remember every little incident that occurred on this particular Sunday, and yet their recollections are so confused in regard to the Sundays before and after it. The way too in which they gave their evidence was not calculated to inspire confidence in their credibility and I feel no hesitation in characterising it as untrue. I find therefore that accused sold the bottle of liquor to Masende.

The accused was found guilty and sentenced to pay a fine of £10, or in default of payment to be imprisoned for two months.

From this sentence the present appeal was brought.

Mr. Juta, Q.C., for the appellant: Two questions have to be decided: (1) the question of law (2); the question of fact; on both of which the appeal must succeed. As to the law it is clear that there was a licence in existence on

the date of the alleged offence. Blow and Anderson being partners and Ware being as much the servant of one as of the other. If the Magistrate's finding on the facts was correct there would have been no defence if the accused had been charged under section 5 of the Proclamation, but he was charged with a contravention of section 10, and as Blow still held a licence the conviction was clearly unlawful. On the question of fact there was abundant evidence that the sale, if effected on the day in question, was not effected by Ware.

Mr. Giddy for the Crown: On the date of the sale Anderson held no licence; if he did hold a licence, what could have been his reason for applying for a transfer to him on the 29th November?

On the question of fact there was abundant evidence in support of the Magistrate's finding.

The Court allowed the appeal.

The Chief Justice said: Had Ware been convicted of selling liquor to a native or selling liquor on Sunday the evidence would have been sufficient to justify the conviction; but the charge on which he was convicted was that of selling liquor without a licence, but Anderson and Blow in partnership took out a licence and engaged Ware, and when Blow left Ware's old authority to sell remained in force, and there was nothing to show that Ware had sold without a licence. He was authorised to sell by Anderson under the licence given to Blow. It is to be regretted there has been a failure of justice, but a man cannot be convicted for an offence other than that of which he was guilty. The conviction must therefore be quashed.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné.]

BENJAMIN V. BENJAMIN. } 1895.
Feb. 4th.

This case stood over from last term for proof of the marriage.

Mr. Graham, for the plaintiff, now called

Mr. David Tennant, who produced the certificate of marriage between the parties.

The Court granted a decree of divorce, an order declaring the deed of separation to be of no further effect, and giving the plaintiff the custody of the child of the marriage, and costs.

ANDERSON V. ANDERSON. } 1895.
Feb. 4th.

This was an action for restitution of conjugal rights, failing which for divorce, on the grounds of the defendant's malicious desertion.

Mr. Graham for the plaintiff.

Defendant in default.

Mr. Norman Lacy gave formal evidence of the marriage between the parties, which took place in March, 1878.

Peter Anderson deposed that he resided at Port Elizabeth. The signatures on the marriage certificate (produced) were those of himself and his wife. He lived happily with his wife for three years after the marriage. Then, in 1881, she left his house at Mowbray without his knowledge for three days. He found her at Rondebosch, and brought her back, but she left again the same night, and he received a summons for assaulting his wife, which was dismissed. She then disappeared for some weeks, and witness, not being able to find her, went to Port Elizabeth. He returned to Cape Town in November last, and from information received from one William Henry Nelson went to Rondebosch, and found she was in service there with Mrs. Fletcher. She said she would rather drown herself than go back to him. He had treated her well, and there was no cause for her desertion. He was still willing to take her back. There were no children. The summons for assaulting his wife was dismissed by the Magistrate.

The Court granted an order for restitution of conjugal rights, the respondent to return on or before 15th April, failing which to show cause on 15th May why a decree of divorce should not be granted.

HAASE, VAUGHAN AND CO. V. (1895.
MALCOLM'S TRUSTEE. { Feb. 4th.

Setting aside judgment—Rule of Court 329—
Entering appearance—Mistake.

This was an application under the 329th Rule of Court to set aside a judgment for £318 10s. 6d. with costs, which was granted on 1st August last by default, in consequence of the present applicants (then defendants) not having entered appearance.

The circumstances under which the defendants were in default were as follows: On the 18th July the power to defend was filed with the Acting Registrar, but appearance was not entered in the appearance book, but on the 19th July the defendants' attorneys wrote to the plaintiff's attorneys informing them that the power had been filed and appearance entered.

Afterwards on 1st August the plaintiff moved for judgment in default under rule 329, and the fact that the power had been filed on the 18th July not having been brought to the notice of the Court, judgment was granted as prayed with costs.

The applicants, after explaining how it was that the mistake had been made, now alleged that Malcolm had no claim against them, except for the sum of £32 16s., for which they were willing to allow him credit; that he was not their servant nor agent, but the manager of the Mercantile Corporation of the United States and South Africa (a company now in liquidation), employed at a salary of £400 a year; and that if he had any claim it was against that company and not against the applicants, but that on the contrary they had a claim against him of £2,000 in consequence of losses occasioned through Malcolm's fraud and deceit.

Under these circumstances the applicants asked that the judgment obtained on 1st August last should be set aside, and leave given to them to enter appearance and defend the action.

Mr. Sheil was heard in support of the application.

Mr. Benjamin, for the respondent, relied on *Saunders v. Jones* (3 D. & L., 473) and *Rymer v. Solomon* (2 Sheil, 350).

The Court set aside the judgment of the 1st August, 1894, and ordered the case to be re-opened.

The Chief Justice said: The whole difficulty in this case arises out of a misapprehension of the clerk employed by the defendants' attorneys. On the 18th July he filed with the then Acting Registrar a power to defend, and he seems to have been under the impression that this filing of the power was tantamount to entering appearance. It is quite clear that he was mistaken, as appears from his letter of the 19th July to the plaintiff's attorneys, in which he states that the defendants had entered an appearance. Well, the case came before the Court on the 1st August, and the Court was then informed that no appearance had been entered by the defendants. Technically the Acting Registrar was right, but I think he ought to have informed the Court that although no appearance had been entered the power to defend had been filed. It is still open to the Court to re-open the case, and I think under all the circumstances, quite independently of the merits of the case, it should be re-opened. At the same time I think there has been considerable delay on the part of the defendants in asking for the re-opening of the case. Judgment was given on the 1st August, and the application should have been made long before the present date. The Court will now grant an order under rule 329, the costs of this application to stand over. What should have been brought to the notice of the Court on the 1st August was the misapprehension that existed as to the filing of the power which

was considered as amounting to entering appearance. That clearly should have been brought before the Court. The form of the order will be that the judgment is set aside, costs to stand over. Costs will not abide by the action, because it is quite possible that if the defendants succeed they may have to pay part of the costs.

Their lordships concurred.

[Applicants' Attorneys, Messrs. J. & H. Reid and Nephew; Respondent's Attorneys, Messrs. Du Preez & Walker.]

ROSS V. FARMER. } 1895.
Feb. 4th.

Splitting of claims—Exception—Slander—
Wrongful dismissal—Damages—Magistrate's jurisdiction.

R. issued two summonses against F., one claiming £20 damages for slander and the other £20 damages for wrongful dismissal.

The slanderous words were spoken and the wrongful dismissal took place on the same date.

The Magistrate, before whom the first case was heard, sustained an exception that there had been a splitting of claims.

Held, reversing the Magistrate's decision, that there was no such legal connection between the two claims as to make a judgment in one decisive in the other.

This was an appeal from a decision of the Assistant Resident Magistrate of Cape Town in an action in which the present appellant, plaintiff in the Court below, sued the respondent, defendant, for £20 damages for slander.

The summons alleged that on or about the 3rd December, 1894, and at Cape Town, the defendant did falsely and maliciously, and in the presence and hearing of Frank Gray, speak and publish of and concerning the plaintiff the following false and slanderous words, namely: "You" (meaning the plaintiff) "*are a damned dirty thief; you sold my books and took money for them and did not hand it over to me,*" (meaning thereby that the said plaintiff embezzled the money) "*You are a God-damned thief.*" Whereby and by reason of such slander as aforesaid the said plaintiff has suffered damage in his fair name and character to the amount of £20 sterling, and he prays that the defendant may be adjudged to pay the same with costs of suit.

The defendant excepted to the Magistrate's jurisdiction on the following grounds:

That plaintiff has sued defendant for £20 damages for slander in this Court. That he has also issued a summons in this Court for £16 13s. 4d. sterling for wages alleged to be due by the defendant, and a further claim for £20 damages for wrongful dismissal. That inasmuch as these three claims together are beyond the jurisdiction of this Court defendant excepts to the jurisdiction, the whole amounts claimed making a total of £56 13s. 4d.

Defendant further excepts and says that plaintiff cannot divide and split up his claim and issue three separate summonses for the amount of his claim, and so by these means endeavour to bring his claim within the jurisdiction of this Resident Magistrate. Therefore the defendant excepts to the plaintiff's summons on the ground of his splitting of claims, and that this Court has no jurisdiction to try same, as these three amounts of £20 and of £20 and £16 13s. 4d., together £56 13s. 4d., are beyond its jurisdiction.

Two other exceptions were filed by the defendant, but for the purposes of this report it is not necessary to give them in detail.

The Magistrate sustained the exceptions with costs, the following being his reasons:

In this case defendant is summoned for £20 for damages for certain slanderous words spoken and published on the 3rd December, 1894, concerning the plaintiff. The defendant takes four exceptions to the jurisdiction of the Court on the grounds set forth in the written exception filed (marked "A" and attached to record).

Having heard the evidence on the exceptions I find that on the day of hearing of the present action another action is pending in this Court between the same parties in which the plaintiff seeks to recover from defendant the sum of £20 for damages for wrongful dismissal on 3rd December, 1894, being the same date on which the alleged slander was published.

I consider that as these two actions accrued on one and the same day, viz., 3rd December, 1894, and both actions being for damages (£20 each) by the servant against his master they are so closely connected that it is not competent for the plaintiff to sue in this Court without splitting his claim. Upon these grounds alone I consider that exceptions one and two should be sustained. *Municipality of Steynsburg v. Green* (3 E.D.C., 239).

From this judgment the plaintiff now appealed.

Mr. Molteno for the appellant: There is no similarity between the present case and *Municipality of Steynsburg v. Green* relied on by

the Magistrate, whose attention could not have been directed to *Van der Heever v. Van Rooyen* (4 Sheil, 73), which is conclusive on the point. There is no connection between the claim for damages for slander and that for wrongful dismissal.

Mr Searle, Q.C., for the respondent: The Magistrate's finding was correct; the two claims arise from one cause of action. The plaintiff should not be allowed to harass the defendant with a number of actions. If his claim be in excess of the Magistrate's jurisdiction he can come to the Supreme Court.

The appeal was allowed with costs.

The Chief Justice said: The summons in this case claims damages for slander uttered on the 3rd December, 1894, by the defendant, the words being set out in the summons. To the summons an exception is taken that it is beyond the jurisdiction of the Magistrate, inasmuch as there has been a splitting of demands. The splitting of demands is alleged to consist in the fact that another summons has been issued against the defendant for wrongful dismissal on the same day, and the Magistrate came to the conclusion that because the two events happened on the same day, namely, the wrongful dismissal and the slander, and because both actions were for damages that therefore there was a splitting of demands. In my opinion the Magistrate was entirely wrong, as there was not such a legal connection between the two cases as to make the judgment in the one decisive in the other; the two cases seem perfectly distinct. The one cause of action is for the utterance of words of slander, and the other is for wrongful dismissal. The fact that they happened on the same day does not effect a legal connection, there being nothing on the face of the two summonses to show that both claims arose out of the same cause of action. I am of opinion that the Magistrate should not have upheld the exception, and I think it unfortunate that the defendant did not allow the case to be tried without raising the exception. The appeal must be allowed with costs.

Mr. Justice Buchanan concurred.

Mr. Justice Upington: I must refer again to what has taken place. In this case an application was made to me to interdict the defendant from realising his goods pending his giving security for costs in the Magistrate's Court. Such security for costs in the Resident Magistrate's Court could not have amounted to more than about £10 at the outside. The next that is heard of the case is that £100 security for costs is demanded from the defendant in East London, and application is made to the Court to attach his person because he has not given

security to the extent of £100—£100 security for costs in the Resident Magistrate's Court at Cape Town! I must say that I shall bear this in mind in the event of any future application with regard to costs.

Mr. Molteno said that the security for £100 included the amount claimed as damages in the summonses as well as the costs.

[Appellant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorney, John Ayliff.]

1895.
KERDEL V. BAM. { Feb. 4th.

Magistrate's jurisdiction—Set off or compensation—Counter-claim—Exception.

In an action in a Magistrate's Court for £18, being for cash advanced, the defendant excepted to the jurisdiction on the ground that he had a counter-claim for £23, but admitted that he owed the £18 to the plaintiff.

Held, that the defendant's claim was reduced by his admission to £5 and that, as this amount was within the Magistrate's jurisdiction, he ought not to have allowed the exception.

This was an appeal from a decision of the Assistant Resident Magistrate of Cape Town, in an action in which the present appellant (plaintiff in the Court below) sued the defendant (present respondent) for the sum of £18, cash paid and advanced by the plaintiff for the defendant at his special instance and request in the months of February, 1889, to March, 1890.

The defendant excepted to the jurisdiction on the ground that he had a counter-claim of £23 against the plaintiff.

Evidence was then taken on the counter-claim, when the defendant admitted that he owed the plaintiff £18, but stated that the plaintiff owed him a balance of £5, which was all he claimed, that is, the difference between £23 and £18.

The Court upheld the exception, and from that judgment the present appeal was brought.

The Magistrate's reasons were as follows: In this case the plaintiff sues the defendant for the recovery of £18 advanced and paid by plaintiff at defendant's special instance and request. Defendant excepts to the jurisdiction of this Court on the ground that he (defendant) has a counter-claim of £23, which exceeds the jurisdiction of this Court. The plaintiff denies the counter-claim. It seems clear that defendant

owes plaintiff £18 and that he (defendant) has a *bona-fide* counter-claim against plaintiff amounting to £23 for money advanced.

I am of opinion that a *bona-fide* counter-claim exists which is beyond the jurisdiction of this Court, and that therefore the Court cannot adjudicate in this case without either giving judgment for an amount which *prima facie* has been extinguished in law, or deciding on a counter-claim which is beyond its jurisdiction. *Brady v. Michiel* (3 Juta, 178); *Brett v. Solomon* (4 Juta, 6).

Mr. Graham was heard in support of the appeal and relied on *Kruger v. Van Vuuren's Executors* (5 Juta, 162).

The respondent did not appear.

The appeal was allowed.

The Chief Justice said: If the defendant had not admitted the plaintiff's claim the effect of his counter-claim would have been to demand from the plaintiff the sum of £23, which amount is in excess of the Magistrate's jurisdiction. By admitting the plaintiff's claim of £18 the defendant reduces his own claim to £5 only. That such a claim could be tried before the Magistrate is clear from the decision in *Kruger v. Van Vuuren's Executors* (5 Juta, 162). But instead of claiming £5 the defendant nominally claims £23 and then excepts to the jurisdiction of the Magistrate. None of the reported cases sanction such an exception and the appeal must be allowed with costs.

[Appellant's Attorney, D. Tennant, jun.]

FIELD AND CO. V. WERNIKOFF. } 1895.
Feb. 4th.

Civil imprisonment — Clerk — Magistrate's discretion.

Where a Resident Magistrate, in the exercise of his judicial discretion, had refused to grant a decree of civil imprisonment, in respect of an unsatisfied judgment, against a clerk employed in a chemist's shop at a salary barely sufficient to support him, The Court, on appeal, refused to reverse the Magistrate's decision.

This was an appeal from a decision of the Resident Magistrate of Oudtshoorn refusing a decree of civil imprisonment applied for by the present appellants against the respondent for non-payment of the sum of £162 18s. 6d., being the amount of a judgment given against the defendant on 8th November, 1894.

A writ of execution was issued, but the sum of £8 15s. was only realised under it.

The facts appear sufficiently from the Magistrate's reasons, which were as follows:

The defendant is a clerk in a chemist's shop, and is wholly dependent on his salary. Plaintiffs are merchants. One Perkins, a jeweller, obtained credit from plaintiffs on a promissory note made by him and defendant. The plaintiffs were well aware of the defendant's position. Perkins absconded, and plaintiffs sued on the note. A writ was issued and defendant's effects were sold, but failed to realise the amount of the judgment. Plaintiffs then sued for civil imprisonment. The evidence satisfies me that defendant's circumstances did not admit of his paying anything further towards the liquidation of the claim. He has made three distinct offers, which have been rejected, and the aid promised to him has been withdrawn. He had only his salary to depend upon, and it was a fair presumption that if sent to prison his employer would dispense with his services, and he would then be reduced to the position of a pauper. No evidence was tendered to contradict the defendant by showing that he had available assets which he withheld, or that he had means other than his salary, which was precarious. The defendant's salary is, in my opinion, barely sufficient to maintain him in a respectable position, and any deductions therefrom over a lengthened period might have the effect of subjecting him to the temptation of dishonesty towards his employers.

The plaintiffs are much to blame in having given credit to Perkins upon the security of defendant, whose position was well known to them. Their conduct appears to have been very reckless. I therefore adhere to the conclusion at which I arrived in this proceeding.

From this judgment the present appeal was brought.

Mr. Juta, Q.C., was heard in support of the appeal, and contended that the Magistrate had not exercised a judicial discretion in refusing the decree.

Mr. Tredgold, for the respondent, was not called on.

The Court dismissed the appeal.

The Chief Justice said: It is not necessary to hear Mr. Tredgold. The question is whether the Magistrate has exercised his discretion so unwisely and injudiciously that the Court should reverse his decision. That a wide discretion is left to the magistrate is clear from the Act of 1856, as well as that of 1879. If it is proved to the satisfaction of the magistrate that the defendant has no property or means, he is justified in refusing to make an order. In the present case it has been so proved to the satis-

faction of the Magistrate. Mr. Juta contends that his discretion has not been judicially exercised; well, I think that is carrying the argument rather far. The defendant's income is £10 per month; his employers take £1 10s.; his board, lodging, and extras amount to £6 5s., and the balance does not leave him much for clothing and other necessities. Under all the circumstances, I think the Magistrate acted quite judicially in refusing an order. If the man hereafter acquires property, it will be quite competent for the plaintiffs to apply again to the Magistrate, but at present I do not think the Court ought to grant an order, and the appeal must be dismissed with costs.

Their lordships concurred.

[Appellants' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

JONES V. TOWN COUNCIL OF CAPE TOWN. } 1895.
Feb. 4th.
" 6th.

Prescription—Town Council—Public road—
Inalienable land—Consent of Governor—
Public square.

Prescription runs as against the Town Council in respect of land forming part of a public square, such land being alienable with the consent of the Governor.

This was an argument on two exceptions taken to the plaintiff's declaration.

The declaration alleged that the plaintiff is the registered owner of a certain piece of land, with buildings thereon, situated at the corner of Grave-street and Church-square, Cape Town, being part of lot 2, block K, and being 10 square rods and 62 square feet in extent.

The title to the land immediately adjoining the limits of the said property so registered in plaintiff's name on the Church-square side of the said property is vested in the defendant Council, and has been vested in it and its predecessors in title since the year 1828 and for a longer period prior thereto.

For a period far longer than the period of prescription the plaintiff and his predecessors in title have uninterruptedly and as of right occupied and built upon a strip of ground adjacent to the limits of his said registered property and facing Church-square. The said piece of ground is 50 feet in length along the Church-square frontage, and is 10 feet broad, it forms portion of the land of which title is vested in the defendant Council as aforesaid; and portion of a building in the occupation of, and

belonging to, the plaintiff stands upon it, and has so stood for a period far longer than the period of prescription.

The plaintiff attaches thereto a plan showing the plaintiff's registered property, and showing the position and extent of the strip of ground aforesaid. The property registered in the name of the plaintiff is marked "A," and the strip of ground hereinbefore mentioned is marked "B" on the said plan.

By reason of the matters hereinbefore stated, the plaintiff has acquired by prescription the ownership of the strip of ground aforesaid, and he is entitled to claim transfer from the defendant Council of the said strip into his own name.

The plaintiff has always been, and is now, ready and willing to do all things necessary on his part to effect such transfer, and hereby offers and tenders to pay all costs and expenses lawfully necessary in connection with the said transfer.

The defendant Council maintains that the plaintiff is not the legal owner of the said strip of ground, and is not entitled to claim transfer as aforesaid, but it claims that it is entitled to the ownership of the ground, and refuses to pass transfer thereof to the plaintiff.

The plaintiff claimed:

(a) An order declaring that the ownership of the said strip of ground marked "B" in the plan annexed is vested in him, and that he is entitled to transfer thereof.

(b) An order compelling the defendant Council to do all things on its part which are necessary to effect transfer of the said ground to the plaintiff, he tendering as aforesaid to pay all costs of transfer.

(c) Such other relief as to the Honourable Court may seem meet.

(d) Costs of suit.

To this declaration the Council took the following exceptions:

1. The defendant Council and every predecessor of the defendant Council in office as the Municipal governing body or the Corporation of the City of Cape Town, is and has at all times been debarred by law and precluded from alienating land vested in the defendant Council, and in such predecessors for public Municipal purposes by reason whereof private ownership by virtue of long adverse occupation or use, commonly called ownership by prescription, cannot lawfully be claimed to have been acquired by the plaintiff or his predecessors in title in respect of the strip of land now in suit, even if the allegations of facts in the declaration be true,

Wherefore the defendant prays that the declaration may be set aside with costs.

2. Should the above exception be overruled, but not otherwise, the defendant Council further says that the plaintiff's declaration is bad in law, in that the plaintiff claims to be declared entitled, as against the defendant Council, to transfer of the said strip of land marked "B," and to an order in terms of the prayer marked (b) in the plaintiff's declaration, by reason that the defendant Council is by law not empowered to pass transfer to the plaintiff of the said land, for any alienation or transfer whereof the consent of His Excellency the Governor is by law required, which consent is not in the declaration alleged to have been given.

Wherefore the defendant again prays that the declaration may be set aside with costs.

Mr. Searle, Q.C. (with him Mr. Graham), was heard in support of the exceptions and relied on the following authorities: *Latsky v. Surveyor-General* (Buch. 77, p. 68); *Rossouw v. Burgers and Others* (1 Juta, 119); *Matthæus, Paroem*, 9 ulto; *Voet* (41, 3, 12), (44, 3, 11), (1, 8, 9, 10); *Grotius* (Maasdorp's Translation), p. 65; *Digest* (43, 11, 2); *Burge* (Vol. III. 18, 19); Hunter 167—*Matthæus de Auction* (2, 7, 45, 46, 47); *South African Association v. Van Staden* (9 Juta, 95); *Cape Town and District Waterworks Company v. Executors of Elders* (8 Juta, 9).

Mr. Rose-Innes, Q.C. (with him Mr. Jones), cited the following authorities: *Municipality of Frenchhoek v. Hugo* (2 Juta, 248); *Schoof v. Weyer* (5 E.D.C., 33); *Town Council v. Mossop* (30th August, 1880); *Mayor of Brighton v. Guardians of the Poor of Brighton* (5 C.P.D., 368); *Blanckenberg v. Colonial Government* (4 Sheil, 61).

Mr. Searle, Q.C., in reply.

Curia ad vult.

Postea (February 6)

The Court delivered judgment.

The Chief Justice said: The plaintiff in this action claims an order declaring that the ownership of a stoep adjoining his house in Church-square, Cape Town, is vested in him by prescription, and an order compelling the Town Council to do what is necessary to effect transfer in his favour. The defendant Council excepts to the action on the ground that the land on which the stoep stands was incapable of being acquired by prescription because it cannot be alienated by the Council, and on the further ground that if the land can be alienated at all, it can only be done with the consent of the Governor, which consent is not in the declaration alleged to have been given. In the course of the arguments the question has been much discussed whether the land in question belongs to

the Crown or to the Town Council. No grant of the land appears ever to have been made to the Council, but, strangely enough, the absence of such a grant has not hitherto stood in the way of transfers being effected by the Town Council of waste lands sold by it with the consent of the Governor. The inconvenience of such a practice was forcibly pointed out by the learned Registrar of this Court in his Parliamentary Report for the year 1893, when he held the office of Registrar of Deeds, but no steps have yet been taken to remedy the inconvenience. In the view which I take of the case it is immaterial whether the title to the land is still in the Crown or in the Council. It is admitted that the Council has had the control of the square so long as the square has been in existence as such. The Council has, therefore, properly been made a defendant in the action, by which title by prescription in a small portion of the square has been claimed, and no objection has been raised that the Government ought to have been joined as co-defendants. The only two objections are that the land is inalienable, and therefore incapable of being acquired by prescription, and that the consent of the Government is not alleged. None of the Statutes which have been cited support the proposition that the land was inalienable. Under De Mist's Instructions to the Burgher Senate, as well as under the later Statutes, the land could be alienated with the approval of the Governor. The defendant's counsel was therefore obliged to fall back upon the common law in support of the first exception. It was not denied that so far as the rights of the Crown were concerned prescription would run in respect of land capable of alienation by the Crown. This point was expressly decided in *Municipality of Frenchhoek v. Hugo* (2 Juta, 230) on the authority of *Voet* (44, 3, 11) and the decision was upheld on appeal to the Privy Council (3 Juta, 346). But reliance was placed upon a remark made by *Voet* in the same passage to the effect that prescription does not run in respect of things *merae facultatis*. It was contended that the stoep was originally built upon a part of the public square, and therefore of a public road, and that the public cannot be deprived by prescription of its right to exercise its *facultas*. It is clear, however, from the reference made by *Voet* to the *Digest* (43, 11, 2), that this is not what he means. *Viam publicam populus non utendo amittere non potest*. The public cannot by non-user lose its right to a public road. It does not follow that the right may not be lost by adverse user. In another passage, which was not cited on either side, *Voet* (13, 7, 7) discusses

this very question at length. He there points out that the rule in the *Digest* only applies where no act has intervened by which the use of the road has been prevented, "for," adds he, "if any one has used a public road as if the property were his own and has built, sown, planted, dug on it or placed fences thereon, or in any other manner has prevented the public from going over it for a period of forty years without any objection or vindication of its rights on the part of the public, no one would, in my opinion, doubt that in such a case the public will have lost the use of that public road by prescription, since no right, private or public, on account of whatsoever cause or person, which has been extinguished by a continued silence of forty years can afterwards be set up."

In the case of *Town Council v. Mossop* (30th August, 1880) it was taken for granted that prescription runs against the Town Council of Cape Town in respect of land built upon by the owner of adjoining property and this view has never since been questioned.

In the present case the declaration alleges that "for a period far longer than the period of prescription the plaintiff and his predecessors in title have uninterruptedly and as of right occupied and built upon" the strip of land in question, and if that allegation is proved the plaintiff will be entitled to succeed. As to the exception that the declaration does not allege the Governor's consent to the alienation of the strip of land, I do not find that any such allegation was made in *Mossop's Case*. The object of the law in allowing a title to be acquired by prescription is to protect persons in the possession of land which they have for the required period occupied *sec vi nec clam nec precario*, and no authority has been cited for withholding this protection in the case of land which can only be alienated with the consent of a third person. Such public domains as are inalienable cannot be acquired by prescription, but land which is capable of alienation, although subject to the consent of a person or corporation other than the owner, may be so acquired, provided only the adverse occupation has been peaceful, open and as of right. The Court has frequently decided that where land has been acquired by prescription the registered owner may be compelled to do what is in his power to do without any expense to himself in order to complete the occupier's title in compliance with the registration laws of the Colony. In the present case the declaration claims an order declaring that the plaintiff has become the owner of the land in question, and to that extent at all events, if all the allegations of the declaration can be proved,

the declaration is unexceptionable. The further claims are of less importance, and even if they should not be sustained their insertion would not, according to the practice of this Court, be a ground for setting aside the whole of the declaration. The exceptions must therefore be disallowed with costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret; Defendants' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

STOFFELS V. MILLS AND RETHMAN (1895.
(LIMITED). (Feb. 5th.

Summons — Exception — Plaintiffs' right to sue — Limited company — Authority.

A director and the secretary of a limited company issued a summons claiming an amount due for goods sold and delivered to the defendant.

The summons alleged inter alia that the plaintiffs were the joint managers of the business and were duly authorised to collect and sue for all accounts owing to the firm. The defendant excepted to the summons on the ground that it did not allege in what manner the plaintiffs had been authorised to sue whether under the articles of association, the trust deed, by resolution of shareholders, by power of attorney, or otherwise.

The Magistrate, before whom the case came, overruled this exception.

Held on appeal, upholding the Magistrate's decision, that the exception was bad, as there was a definite allegation in the summons that the plaintiffs were authorised to sue, no attempt having been made by the defendant to disprove that allegation.

This was an appeal from a decision of the Resident Magistrate of Umsikata, Pondoland, in an action in which the present respondents (plaintiffs in the Court below) sued the appellant (defendant) for the sum of £1,296 7s.

The defendant was summoned to answer the managers of the firm of Mills & Rethman (Limited), a limited liability company carrying on a general mercantile and trading business in Pondoland, Cape Colony, and elsewhere.

The summons went on to allege that John Frederick Rethman is a director and Francis Walton is the secretary, and as such are the joint managers of the business in Pondoland aforesaid, and are duly authorised to transact

all business, collect and sue for all accounts and debts owing to the said firm. That one George Stoffels (the abovenamed defendant) is a trader, and did on divers occasions, namely, between the 31st December, 1891, and 25th August, 1894, transact business with the said firm and buy from and sell to the said firm such articles as appertain to a general trader's business, as will more fully appear on reference to the account herewith annexed, marked "A," which plaintiffs pray may be considered as inserted herein.

That the said account shows that there is a sum of £1,296 7s. due by defendant to plaintiffs in their aforesaid capacity, and which the defendant neglects and refuses to pay, though frequently requested so to do.

Wherefore the plaintiffs pray that the defendant may be condemned by this Court to forthwith pay the said amount to the said firm of Mills & Rethman, together with such interest as may be found due thereon, and the costs and expenses of this suit.

Mr. Zietsman appeared for the plaintiffs.

Mr. Jones for the defendant.

Mr. Jones before pleading wishes security for costs.

Mr. Zietsman is prepared to admit anything that may be put to Mr. Walton, whom Mr. Jones wishes to put in the box.

Mr. Jones: Do you admit that Mills & Rethman are a limited liability company?

Mr. Zietsman: Yes.

Mr. Jones cites sections 128 and 126, subsection 4, of the Companies Act, 1892, on the question of security for costs.

Mr. Zietsman replies, and points out that there are sufficient assets of the company within the jurisdiction of the Court to cover any costs, and further, that this Act does not apply to Pondoland, having never been extended.

The Court is satisfied that there is no danger of costs not being paid, and that the plaintiffs have assets sufficient to cover such costs within the jurisdiction.

The defendant's attorney then handed in the following exceptions:

1. That the issue of the summons by the clerk of the Court was irregular and illegal, inasmuch as at the time of such issue he failed to satisfy himself that John Frederick Rethman and Francis Walton, who institute this action on behalf of the plaintiff firm, had the legal right so to act.

2. That the summons does not allege in what way the said John Frederick Rethman and Francis Walton acquired their alleged right to sue on behalf of the plaintiff firm, whether under articles of association, trust deed, resolution of shareholders, power of attorney, or otherwise.

3. That the plaintiff firm is not a limited liability company according to the law of this colony, wherefore defendant claims that the summons is irregular and incomplete, inasmuch as the same does not disclose the names of all the partners or shareholders constituting the said firm, all of whom should be joined as plaintiffs in this action.

4. That the account annexed to the summons does not, as alleged in sections 3 and 4, show the sum of £1,296 7s. as being due by the defendant; but on the other hand it is shown in the account referred to that the business transactions said to have taken place between the 31st December, 1891, and 28th August, 1894, leave a balance of £315 2s. 5d. due by the plaintiff firm to the defendant.

5. That the account annexed to the summons is vague and incomplete, inasmuch as it does not as by law required give details or particulars of any goods said to have been sold to defendant, and that such items as the following (here certain items were specified) and many others of a similar nature are without further particulars quite unintelligible, wherefore defendant is unable to check the account, and is thereby prejudiced in his defence.

The plaintiffs' attorney admitted that no articles of association were exhibited to the clerk of the Court at the time of the issue of summons or since.

The Resident Magistrate overruled the exceptions, and from that decision the defendant now appealed.

Mr. Graham was heard in support of the appeal.

Mr. Rose-Innes, Q.C., for the respondents.

The appeal was dismissed with costs.

The Chief Justice said: I have already remarked that there is no appeal on the question of security. The appeal noted by the defendant's agent in the Court below was simply against the Magistrate's overruling the exceptions. As to those exceptions, the fourth and fifth are clearly exceptions on the merits, and the only exception that can be taken into account is the one in which objection is raised against Rethman and Walton suing as managers on behalf of the company. Now, this exception must be considered with regard to the summons as it stands, and if, upon the face of the summons, there is sufficient proof of authority to the plaintiffs to sue on behalf of the company, then the exception was a bad one. The summons commands the defendant to answer the managers of the firm of Mills & Rethman, and the second paragraph of the summons alleges that the said John Frederick Rethman is a director and Francis Walton the secretary, and

as such the joint managers of the said business in Pondoland, and are duly authorised to collect or sue for all accounts. There is a definite allegation that they are persons authorised to sue, and if they fail to prove it in the action, then the Magistrate will give absolution. Instead of attempting to disprove it, the defendant took the exceptions. Well, the Magistrate was quite right in overruling the exceptions. At the same time I may make this remark, that I advise the plaintiffs to be prepared, when the case comes before the Magistrate to be decided on the merits, with a warrant from the chairman of the company, and if any objection is then raised, an amendment may be made: but even without any objection, I should think it would be far better, before the case goes to trial, to make the amendment. On the summons as it stands, there is no ground for the exceptions, and the appeal must therefore be dismissed with costs.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondents' Attorneys, Messrs. Van Zyl & Buissinné.]

WALDER V. KRYNAUW. { 1895.
Feb. 6th.

Shares—Alleged sale—Conflict of evidence—
Credibility—Character of witness.

This was an action instituted by the plaintiff against the defendant for delivery of ten shares in the Paarl Fire Insurance and Trust Company, or for £100 damages for non-delivery.

The declaration alleged that on the 23rd November, 1894, the defendant sold to the plaintiff, and the latter purchased from the defendant ten shares in the Paarl Fire Insurance and Trust Company at £6 per share.

That the plaintiff offered to pay the price of the shares, £60, but that the defendant failed to deliver them.

The plaintiff claimed:

(a) Delivery of the ten shares (he tendering the purchase price, £60), or in the alternative £100 damages for non-delivery.

(b) General relief and costs.

The defendant in his plea admitted the tender of £60, but denied that any contract of sale had been concluded between the parties.

The replication joined issue.

Mr. Searle, Q.C., and Mr. Buchanan appeared for the plaintiff.

Mr. Tredgold for the defendant.

Ferdinand Walder, the plaintiff, deposed that he resided at the Paarl. The defendant lived on a farm about one and a half hours' from the Paarl. Witness's son, Ferdinand, carried

on business as a butcher at the Paarl. On the 23rd November last, after nine o'clock in the morning, the defendant came to his son's shop. Witness, his son, and defendant were then together. Defendant told witness that he (defendant) knew he had shares in the Paarl F. I. & T. Company, and that he (defendant) also had shares in the company. They had a talk about signing for a continuance of the company, which had run out in terms of the trust deed. Witness thought it expired on the 1st October. The directors were canvassing for signatures for continuing the company. Defendant said he would not sign, saying he would rather sell his shares. Witness asked him then how many shares he had, and he answered ten, and that he would sell the ten for £60. They were £10 shares, but only £3 10s. was paid up. The offer was accepted, and defendant said he would bring the shares next time he came. Subsequently he saw defendant many times in the village, but defendant always avoided him, and never brought the shares. On the 29th November he caused Mr. Marais, his agent, to write to defendant demanding the delivery of the shares. He received no answer to the letter. Witness had twenty shares in the company and had been recently offered £14 per share. The price of the shares on the 23rd November was indefinite, but witness knew they were worth a little more than the price agreed upon. Shortly after the conversation at which the sale took place he saw one Hofmeyr and also a Mr. De Villiers, secretary to the Paarl F. I. & T. Company, and learned from them that the defendant had sold his shares to the company for £66.

Cross-examined by Mr. Tredgold: At present witness was an unrehabilitated insolvent. Had the money by him at the time to pay for the shares. Did not offer the money to defendant on the spot. Defendant simply came to his son's shop to buy some meat. Defendant said he was tired of the shares, and in reply to witness's question said he would take £60 for the ten. Defendant did not say he would have to consult his wife. Sold ten of his shares in 1894 for £45. Told Hofmeyr that he would sell all his shares in the company for £1,000. This would be for fifty shares. His object in wishing to acquire shares was to force the company to buy him out. Witness refused to sign for the company.

Counsel here produced books in connection with witness's insolvency.

Cross-examination continued: Was not aware that the entries purporting to have been made by witness in 1879 were made in a book that was not published till 1882. When the same

question was put to him at the meeting of his creditors witness was silent. Was examined before Mr. Dreyer, Assistant Resident Magistrate. He copied the entries out of an older book into that book—but he did not say that before the Magistrate. He did not want to have anything more to do with that affair. After the examination before his creditors witness's son made a compromise, and the inquiry was not continued. Witness would not now sign for the continuance of the company, but he would not say what he would sell his shares for. Mr. Möll had offered him £14 each for them a week ago. The company wanted to buy the shares for the purpose of continuing it, and were prepared to pay a little more for the shares on that account. The company was an unlimited liability one, and the unanimous consent of the shareholders had to be obtained for continuing it. Witness, as an insolvent, could not register the shares in his name.

Re-examined: Witness became insolvent in the beginning of 1890. Then held forty-five shares in the Paarl Bank, which was in liquidation, on which there was a call of £250 per share. Had no other liabilities. Owed nothing except to the Paarl Bank. Gave the shares in the Paarl F. I. & T. Company into the estate, and there was a compromise, and he got the shares back again. His estate was not released from sequestration on the compromise. The compromise was that he paid £800 to the Paarl Bank, and also some interests in certain shares. When he offered Hofmeyr his shares for £1,000, he did not include the shares which he had just bought from defendant.

Mr. Justice Buchanan: He would hold those so as to force the company a second time.

Re-examination continued: Gave up his butcher's business to his son in November, 1890. At that time there was a run on the Paarl Bank. No steps were ever taken against him in respect of his insolvency. The shares had been gradually rising in price since the difficulty arose about continuing the company.

By the Court: Heard two days after the sale that defendant had sold his ten shares for £66. Paid about £900 to the Paarl Bank as the compromise.

Ferdinand Walder, jun., son of the last witness, gave similar evidence regarding the conversation when the sale took place. There would have been no difficulty in finding the money to pay for the shares on delivery. Was present at the conversation between his father and Mr. Hofmeyr. Hofmeyr came about signing for the continuation of the company, and his father said he would see about it, and that he had

bought another ten shares from defendant. When the compromise was made, Mr. De Villiers promised his father his rehabilitation, but that had not been done. His father did not pay the compromise with his children's money. His father's evidence at the creditors' examination was not correct in that respect.

The Chief Justice said that the plaintiff in his evidence at that examination said the compromise was paid with his children's money.

Cross-examined: Was thirty-two years of age. His father did not tell Hofmeyr that if he sold his own shares for the £1,000 he would let the ten shares he had bought from defendant go. Witness could not remember anything about false entries in the books disclosed at his father's examination in insolvency. After the compromise witness destroyed the books. Heard two days after the sale of the shares that defendant had sold the shares to Mr. De Villiers for £66.

Re-examined: His father told Hofmeyr he had bought the ten shares from defendant. Witness had to assist in his father's compromise. Witness took over his father's business about three months before the Paarl Bank smashed.

The Chief Justice: It was at the very time that the Paarl Bank smashed.

This closed the case for the plaintiff.

Mr. Tredgold applied for absolution from the instance, which the Court refused.

David Anthony Krynauw, the defendant, said that when plaintiff offered him the £60 for the shares he replied that he could not sell or say anything on that day, and nothing further transpired. He did not want to sell the shares to anybody but the Board itself, and he sold them two or three days afterwards to the Board for £66. Had heard from people that the plaintiff, when he became insolvent, made everything over to his son.

Cross-examined by Mr. Searle: Did not think that plaintiff might not be able to pay for the shares. Told plaintiff he was troubled with the shares, and then plaintiff said he would buy them. Did not tell plaintiff he wanted to get rid of the shares.

The Chief Justice said that the witness did not wish to sell his shares to anybody but the company itself, because he was afraid, the company being an unlimited one, his estate might be held liable if he sold to anyone outside.

Cross-examination continued: Got the letter of demand on the 2nd December, but did not reply because he had not sold the shares to plaintiff. Had never been near Walder's shop since, although previously he used to purchase meat there. On the 28th November he brought his shares to town, because his wife told him he

could sell them to Mr. De Villiers. Neither the plaintiff nor his son had asked him to bring in the shares. Sold the shares to De Villiers for £66.

John Hendrick Hofmeyr, clerk to Mr. De Villiers (secretary to the company), said that he went to the plaintiff on the 22nd November, between ten and eleven a.m., and asked him to sign for the continuation of the company. Just as witness walked into the butcher's shop, defendant came out of it. Plaintiff refused to sign, and said he wanted £1,000 for his fifty shares. Told witness that he had bought another ten shares from defendant for £60, but that he would not insist upon that. Saw defendant again the same afternoon, and defendant distinctly said he had not sold the shares to plaintiff. Saw defendant again on the 28th November, when he sold the ten shares to witness for Mr. De Villiers for £66.

Cross-examined: The company was anxious to get hold of the shares of the people who would not sign. The cheque to pay for the ten shares was on from Mr. De Villiers' private funds.

Mr. Searle said he believed that the transaction was a private one of Mr. De Villiers', and that he, not the company, bought the shares.

Witness, continuing, said he did not ask plaintiff why, as he was asking £1,000 for fifty shares; he would not insist on the bargain he had made with defendant at £6 per share. Did not know at what price the shares had been on offer at the Paarl.

The Chief Justice: Oh, it is of no use trying to extract anything out of this witness.

Jacob Isaac de Villiers, secretary to the company, deposed that the only way of continuing it was by getting shareholders to sign their consent. A few shareholders refused to sign, amongst them the plaintiff. On the 22nd November defendant had a conversation with witness, and said he would see his wife about selling the shares or signing. Subsequently he was surprised to hear a report that defendant had sold the shares to the plaintiff, and could not believe that defendant would play him so false. If the company was judiciously liquidated the shares would be worth three or four times as much as the amount paid upon them. It had now been decided to liquidate. Some shares were sold recently at about £10, but in November £65 for ten shares would be the market price; the market price was then about £5. Did not know how long the liquidation would take, but eventually the shares would turn out very valuable. In connection with plaintiff's insolvency, he knew that there were discrepancies in the books.

F

Cross-examined: The Paarl Bank thought it judicious to accept plaintiff's compromise. No criminal proceedings were taken against the plaintiff. He was the trustee in the estate, and people could draw their own conclusions as to whether plaintiff had made himself liable to a criminal prosecution or not. The shares might turn out to be worth £20 or £25. Would be glad to get all the shares he could at £12 to £14. About a week ago the shareholders who would not sign, including the plaintiff, offered to sell their shares for £16, but the Board refused to take them on principle. Saw the defendant on the morning of the 22nd November, unless witness was much mistaken.

The Chief Justice: The defendant said that he did not see either Mr. Hofmeyr or Mr. De Villiers before seeing the plaintiff that day.

The plaintiff (recalled) deposed that he went back to the Paarl on the very same day that he gave his evidence in the case of *Falconer v. Walder* in the Supreme Court. He went home by the night train. Knew that the judgment in the case was given the day after he gave his evidence, and was present in court when judgment was delivered.

The defendant (recalled) said that before he went to the butcher's shop, when the alleged sale took place, he saw Mr. Hofmeyr.

Mr. Searle was heard for the plaintiff.

Without calling on Mr. Tredgold, the Court granted absolution from the instance with costs.

The Chief Justice said: Mr. Searle very correctly stated that by our law a contract of this nature is not required to be in writing, and that it may be proved by oral evidence; but it is clear that the burthen of proving the contract lies upon the plaintiff. He must satisfy the Court that the contract of sale was made and understood by the defendant as well as by himself at the time. Now it is quite clear from the evidence that—whether the contract was made on the 22nd or 23rd of November—at the time when it is said to have been made the plaintiff was very anxious to buy these shares, and it is by no means clear that the defendant was equally anxious to sell; and according to the plaintiff's own account he somewhat rushed the ignorant farmer, who came to his shop not for the purpose of dealing in shares but in order to buy beef. In the course of conversation with this ill-informed old man, something came out about the company being wound up, and the old man said, "It is such a bother about these dividends. I want my dividends and I would like to sell my shares." At once the plaintiff snaps it up. The defendant said he would never sign, but would rather sell and be rid of the shares. The plaintiff then

said, "I asked him how many shares have you?" "Ten." "What do you want for them?" He said, "£60; I think £3 10s. have been paid up on each share." I said, "If that is so, I will take them at £60." It shows his eagerness to take the old man at his word suddenly and to bind him down to the bargain there and then. The old man says nothing of the kind took place, but the son corroborates the plaintiff. It is, however, difficult here to see where the father ends and the son begins. I think it is one of those cases in which it is impossible to lose sight of character. The old man, the defendant, comes to the Court with a stainless character. He has never been insolvent or in the law court. Mr. Walder seems to know the inside of the Court very well; on the very day before this transaction he was engaged in a case before the Court in which it appears that he, who had been insolvent in 1890, actually entered into a transaction by which he was to buy property worth £5,000 or £6,000. Well, if one reads his evidence before the commission on his insolvency one cannot lose sight of character. That evidence shows that the insolvency was one of those too frequent in the Colony where advantage is taken of creditors in a most disgraceful manner. He took steps to dispose of his assets when the Paarl Bank went into liquidation and assigns £1,200 to his son, for what—for salary! His son had been in the business for years and had drawn benefits from it, and then the plaintiff hands over the business and £1,200 to his son so as to deprive his creditors of the assets. Fortunately, afterwards a compromise was made and something came out of the estate; but how the amount of the compromise was paid is not quite clear. The question of character must come in when it is a matter of oath against oath. I was not very pleased with the manner in which the defendant himself gave his evidence, because he forgot some circumstances which Mr. De Villiers and Mr. Hofmeyr recollected, but at the same time because he was at fault on a few minor points that does not affect his evidence as to the main issue, whether there was a contract or not. It seems so unlikely that he would, a few days after selling the shares to the plaintiff, sell them again for a profit of £6, if he had really sold them to the plaintiff. But even if he did so, the plaintiff has himself to blame if he cannot now enforce the law, as he might at the time have drawn up a written document and induced this old man to sign it. In the absence of such a written contract there must be clear evidence, and in the absence of such clear evidence he is not entitled to succeed in this action. The Court therefore grants absolution from the instance with costs.

Mr. Tredgold applied for defendant's witnesses' expenses, which were granted.

[Plaintiff's Attorney, Gus Trollip; Defendant's Attorney, C. C. de Villiers.]

SUPREME COURT.

[Before Mr. Justice BUCHANAN and Mr. Justice UPINGTON, K.C.M.G.]

REHABILITATION. } 1895.
Feb. 7th.

Mr. McLachlan applied for the rehabilitation of Philip Rosenthal.

Granted.

JONES V. VICKERS' TRUSTEE } 1895.
Feb. 7th.

Costs.

Where an ex parte application was made for an order compelling the trustee in an insolvent estate to file a contribution account the matter was ordered to stand over so that notice might be given to the trustee.

Afterwards the Court refused the application with costs, as it appeared that the account had been filed the day before the original application was set down for hearing.

This was an application on notice to the respondent that he would be required to show cause why he should not be ordered, as trustee of the insolvent estate of John Vickers, to frame an account of contribution amongst the creditors of the insolvent estate for the payment of the judgment and costs obtained by the applicant against the said insolvent estate, or otherwise to get in and collect from the creditors in the said estate the amount of the said judgment and costs, and why he should not pay the costs of this application *de bonis propriis*.

The applicant obtained judgment for £8 and £33 9s. 4d. costs against the respondent in his capacity in the Periodical Court at Lady Grey on 19th July, 1894.

On 28th August, 1894, the applicant issued a writ to which there was a return of *nulla bona*. On 7th November, 1894, the applicant through his attorney wrote to the respondent calling upon him to frame a contribution account.

To this letter no reply was received. On 4th December, 1894, the applicant again wrote to the respondent telling him that unless he heard from him on that day that the necessary steps had been taken to frame a contribution account he (applicant) intended to proceed against him forthwith.

The applicant alleged that the respondent had failed and neglected to frame the account as requested and to act therein as he was obliged to do, and that he verily believed that the respondent had not filed any account of his administration of the estate.

The prayer was for an order compelling the respondent to file an account with costs against him. The judgment for £8 and costs given against the respondent in the Periodical Court at Lady Grey was for the applicant's expenses as a witness in an action brought against the trustee by the Divisional Council. The Magistrate in giving judgment in favour of the applicant ordered that if the judgment were not satisfied within one month from date the defendant (present respondent) was to satisfy it out of his private estate, against which execution might issue.

On appeal to the E.D. Court that part of the Magistrate's judgment which ordered execution to issue against the private estate of the trustee if the judgment were not satisfied within a month, was struck out.

The respondent filed an answering affidavit in which he alleged that the second liquidation and contribution account was filed with the R. M. of Aliwal North on *11th January, 1895.

The present application consequently resolved itself into a question of costs.

Mr. Molteno for the applicant.

Mr. Searle, Q.C., for the respondent.

The application was dismissed with costs.

Mr. Justice Buchanan said: In the application now before the Court the Court cannot lay down any ruling regarding the account, which has already been filed. It affects other persons besides the applicant and respondent, and consequently no judgment on that can be given. At the present time the question is one of costs. Now, it is admitted that the accounts have been filed. The affidavits show that there has been a long-standing fight between the attorneys, who have been making costs unfortunately for some time past. An *ex parte* application was made

* On 12th January, 1895, application was made *ex parte* for a rule nisi calling upon the respondent to show cause why he should not be called upon to file the account. The Court then ordered the matter to stand over until 1st February, so that notice might be given to the trustee.

on the 12th January calling upon the trustee to file a second account, but the day before the application was made the account was filed. Notwithstanding that this account had been filed with the Magistrate of the district, proceedings were taken thereafter, on the 17th January, calling upon the trustee to furnish an account which he had already filed, and the question is whether these proceedings were justified. The accounts were filed before any notice was given of the application, which was therefore an unnecessary one, and must be refused with costs. It is another case which shows the necessity of giving notice in these applications, instead of rushing to the Court in the first instance with an *ex parte* application.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorney, G. Montgomery-Walker.]

IN THE INSOLVENT ESTATE OF GEORGE EDWARD MANDY.

Mr. Tredgold applied for an interdict restraining George S. T. Mandy, a son of the insolvent, from interfering with or reaping the crops, or removing stock or other property, or disposing of the same, belonging to the said estate, at the farm Pelion, in the vicinity of Lady Grey.

A rule nisi was granted, returnable on the 21st instant.

Ex parte MCGIBBON. } 1895.
Re MINORS MCGIBBON. } Feb. 7th & 13th.
Minors—Funds in Master's hands.

This was an application for authority to the mother of the said minors to retain a sum of money (£82 11s.) received by her on their behalf, and further to draw from the money to their credit in the Guardians' Fund a further amount for the purpose of paying outstanding debts and purchasing furniture.

The facts are these: Mrs. M., (married out of community to McGibbon) was on M.'s death in 1889 appointed executrix dative in the estate. Issue of the marriage had been three children (aged ten years to five years). M. left two houses value £500, and movables realising £512 14s. 3d. The latter amount was paid out in settlement of the debts and in reducing the mortgage on the houses. For some time the widow lived in and drew rents from the houses; but after removing to Cape Town she sold the houses by direction of the Master and paid the amount into the Guardians' Fund to the credit of the minors.

A sum of £82 11s. was also received by her as a legacy for the minors—but Mrs. M. spent this for the clothing, education, and maintenance of herself and the minors; incurring for this purpose, moreover, a further liability of £51.

The Master called on the executrix dative to pay the £82 11s. in to him to the credit of the minors.

Application thereupon was made by her to the Court for leave to retain that sum; and for an advance of £105 11s. from amount to the minors' credit in the Guardians' Fund to enable her to pay off the £51 and to start a boarding-house, she being without means and entirely dependant on friends.

Mr. Sheil for the applicant.

Mr. Justice Buchanan said: The applicant, as executrix dative, should have paid the money received by her to the Master, but instead of this, without any authorisation at all, she spent the money for the purpose of living. She now applies practically for another £100. The children are aged ten down to five years, and if this goes on, in a very short time there will be nothing at all left for the children. The executrix ought at once to pay this amount of £82 into the Guardians' Fund, but under the special circumstances the Master need not insist upon the payment of this £82. The Court can, however, make no further order.

Mr. Justice Upington concurred, although he had some doubt whether the mother should not be compelled to pay the money received on account of her children, as she was bound to do in her capacity as executrix dative.

Postea (13th February, 1895).

The Court ordered that £75 be advanced as prayed, on condition that the interest due from the Guardians' Fund to the minors be not drawn for three years.

[Applicant's Attorneys, Messrs. J. & H. Reid & Nephew.]

IN THE MATTER OF THE MINORS SPIES.

Mr. Watermeyer moved for authority to raise a sum of money on mortgage of the farm Romansfontein, in the district of Albert, bequeathed with other property to the said minors, to satisfy certain legal and other expenses necessary to enable them to obtain transfer.

The order was granted.

Ex parte TROWER. } 1895.
Feb. 7th.

Marital power—Non-exclusion in ante-nuptial contract—Property registered in

wife's name—Leave to transfer without husband's authority—Rule *nisi*.

Where a woman married by ante-nuptial contract, the marital power not being excluded, sought to transfer property registered in her name without the assistance of her husband, whose whereabouts were unknown, the Court granted a rule calling upon the husband to show cause why his wife should not be allowed to pass transfer.

This was the petition of Johanna Wilhelmina Paulina Elizabeth Trower (born Jansen).

The petitioner was formerly married to one Buur, from whose estate she took over certain landed property situate at Rondebosch, Cape Division, more fully described in certain deed of transfer dated 21st September, 1882.

In 1882 the petitioner remarried one Trower, excluding community of property but not the marital power. Owing to her husband's intemperate habits she desired him to leave her unless he reformed. The husband left and since his departure for Johannesburg she had had no direct communication with him.

The petitioner lately sold two lots of ground registered in her name and the purchasers were now demanding transfer, but in consequence of the marital power not having been excluded in the ante-nuptial contract, the Registrar of Deeds refused to pass transfer unless the petitioner's husband assisted. The petitioner alleged that she intended to devote the proceeds of the sale to paying off a bond on the property; that she had endeavoured, but without success, to obtain her husband's signature to a power to effect transfer.

The prayer was for an order authorising the Registrar of Deeds to pass transfers to the purchasers of the land in question, and of such further lot as she might be able to sell.

Mr. Tredgold was heard in support of the application and relied on *Van der Broek v Registrar of Deeds* (3 Juta, 296), and *Ferreira v. Registrar of Deeds* (5 Juta, 387).

The Registrar directed the attention of the Court to *Joubert's Case* (2 Sheil, 131).

The Court granted an order similar to that made in *Joubert's Case* (2 Sheil, 131), the rule to be returnable on the last day of term, and to be published once in the "Government Gazette."

[Petitioner's Attorney, C. C. de Villiers]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS (Chief Justice),
Mr. Justice BUCHANAN, and Mr. Justice
UPINGTON, K.C.M.G.]

ROBERTS V. ROBERTS. { 1895.
Feb. 8th.

This was an action for divorce instituted by Mr. Richard Roberts against his wife, Mrs. Ellen Roberts (born Williams), on the ground of her alleged adultery with one William Owen Davies.

The declaration alleged that the parties to the suit were married on the 24th December, 1871, in the parish church of Perian, Arnworthe, in the county of Cornwall, England, and that the marriage was still in full force and effect. That there had been issue of the marriage two daughters, one of whom was still a minor. That at divers times and places in this colony, but more particularly at Cape Town, between the years 1888 and 1895, the defendant wrongfully and unlawfully committed adultery with one William Owen Davies.

The plaintiff claimed a decree of divorce.

Mr. Sheil appeared for the plaintiff, and informed the Court that Davies had been joined as a co-defendant, and £500 damages claimed as against him, but that he had compromised the claim, and the action against him was withdrawn.

The defendant was in default.

Richard Roberts, the plaintiff, deposed that he and the defendant were married on the 23rd December, 1871, in the parish church of Perran, Arnworthe, Cornwall. There were two children of the marriage. Witness came to South Africa alone in 1877; his wife followed him in 1878, and he lived with her in East London up to 1888. He then became acquainted with Davies, who had lost his wife, and he came to witness's house as a boarder. Witness subsequently ordered him out of the house in consequence of Davies being too familiar with his (witness's) wife. After Davies left, the defendant went to Aliwal North, taking one of the daughters with her. On her return from Aliwal North she refused to live with witness again, and she finally left East London in 1888, taking the youngest daughter (then about six) with her. Had not seen his wife since, and in October last he advertised for the whereabouts of his daughter, and received a certain letter in reply. Heard his wife was in Cape Town about two years ago, and in consequence of what he heard instituted these proceedings. One of his children was married, and the youngest (aged thirteen) was

with her mother. He did not claim the custody of the child. The photograph (produced) was that of his wife.

Mrs. Letta Maria Hine, living at 10, Caledon-street, deposed that the photograph was that of Mrs. Davies. Witness attended her in three confinements during the last six years, the last was on 12th September, 1891. She knew the reputed husband of Mrs. Davies. He was not the plaintiff.

Mrs. Sarah Wright, living at Annie Villas, Main-road, Woodstock, identified the photograph as that of Mrs. Davies. Mr. and Mrs. Davies hired one of witness's cottages, and they lived together. The Mr. Davies was not the plaintiff.

The Court granted a decree of divorce.

[Plaintiff's Attorney, C. C. Silberbauer.]

DAY V. DAY. { 1895.
Feb. 8th.

This was an action for restitution of conjugal right, failing which for divorce, on the grounds of the defendant's malicious desertion.

Mr. McLachlan appeared for the plaintiff.

The defendant was in default.

William Arthur Day, law agent practising at Cape Town, said he was married to the defendant at St. George's Cathedral 5th October, 1885. They lived happily for two and a half years, when they had differences, and she ran away to England. Did not know she intended to go until her clothes were packed in boxes and put on a cab. They were married by ante-nuptial contract. He ultimately got her back from England. Before going she contracted certain debts in Cape Town, and witness paid her return fare. While she was away witness sent her £5 or £6 per month. He had great difficulty in inducing her to come back, but in 1889 she came back to South Africa, when after living together for two or three weeks they again fell out. His wife drank. At that time he suffered severely from rheumatism. After two or three weeks she commenced drinking again, and was mad drunk every day; in fact, she was the cause of the death of his little child. At that period witness was in bed ill. One day his wife came in and threw some of the furniture at witness, who was in bed and could not move. Finally she advanced towards him as though about to strike him, and then witness struck her; the only time he had ever struck her in his life. His wife issued a summons for assault, but afterwards withdrew it. After that his wife left him, and went to live in Strand-street, selling the furniture which witness had

settled upon her by ante-nuptial contract. Witness still attempted to bring about a reconciliation, but she said that the best thing he could do was to get a divorce. Subsequently she went to Mr. Cecil Rhodes and told him a lot of lies, and Mr. Rhodes gave her a ticket to England, and she also borrowed £10 from Mr. Graaff, and she then went to England. Both the children were dead. An inquest was held on one of them. As a matter of fact, his wife, being drunk, put the child in the servant's bed one night; the next morning the child was dead. If she now came back to him he would have to receive her, but he would not send her any more money. He denied that he used to drink excessively. It was not true that he had ever been guilty of cruelty towards his wife.

The Chief Justice said he had received a letter from the wife, in which she stated that she would be perfectly willing to come back, but had no means, and that she left plaintiff on account of his cruelty and refusal to maintain her. She was at present in domestic service.

Peter Weineman gave evidence referring to the occasion of the alleged assault. Witness served the summons on the plaintiff, and found him lying in bed very ill. The furniture was lying broken all about the room. Mr. Day was very weak and ill, and said his wife had tried to cut his throat.

Mr. C. C. Silberbauer said he knew something of the circumstances. In January, 1892, Mrs. Day came to witness complaining of her husband's intemperance and cruelty. She subsequently issued a summons, but the hearing was adjourned on account of the plaintiff's illness, and afterwards was abandoned on account of the illness of her child, which afterwards died. From his own personal knowledge he did not know whether her allegations of cruelty were true or not. Before her marriage she was lady's maid to Lady Robinson, and seemed very reluctant to give publicity to her troubles. From his own observation, he never thought that Mrs. Day drank; she had not the appearance at any time of a woman who drank. Mr. Day, however, was sometimes intemperate.

Mr. Weineman (recalled) gave evidence as to the death of the child. At the time of the alleged assault it was in a starving state; was nothing but skin and bone, seemed neglected, and afterwards died.

The Court granted an order for restitution of conjugal rights, defendant to return to the plaintiff on or before the 1st May, failing which to show cause why a decree of divorce should not be granted on the 16th May. Personal service to be effected and the plaintiff to arrange with one of the steamship companies to give

his wife in England a second-class ticket to South Africa should she elect to comply with the order.

HAUPTFLEISCH V. HAUPTFLEISCH. { 1895.
Feb. 8th.

This was an application by the defendant, who is being sued by her husband for restitution of conjugal rights, for the sum of £50, to enable her to defend the action, in which she claims in reconvention a decree of judicial separation on the grounds of her husband's cruelty. The parties are married in community. The joint estate was sold some time ago and realized £100. The case made by the respondent was that his wife was already in possession of £30, belonging to the joint estate, and he tendered £20 in addition. The applicant denied that the £30 formed part of the joint estate, and alleged that it belonged to the child of the marriage, having been received from its grandfather.

Mr. Molteno for the petitioner.

Mr. Benjamin for the respondent.

The Court granted an order for the payment by the husband to the wife of the sum of £35 for the purpose of enabling her to meet the costs of the action. The bar to be removed and the applicant allowed to enter appearance and plead. Costs to be costs in the cause.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

CLEMENTS AND CO. V. VOS.—CLE- { 1895.
MENTS AND CO. V. VAN RHYN. { Feb. 11th.

Sale of goods—Non-delivery within stipulated time—Onus.

In an action on an oral contract for the sale of goods the defendants pleaded, as the defence for their repudiation of the contract, the non-fulfilment of a condition that the goods should be delivered by a specified date.

Held, that the onus of proving that no such condition formed part of the contract lay on the plaintiff.

These two actions were heard together. In the first the plaintiffs claimed the sum of £11 18s. 4d. damages.

The declaration alleged that on or about 21st February, 1894, the plaintiffs, through their agent, Robert Howson, sold to the defendant certain goods for the sum of £26 2s. 8d. The goods were to be ordered from Europe.

That the plaintiffs paid on account of defendant dock dues and other charges amounting to £4 15s. 9d.

That the defendant refused to accept or pay for the goods or charges, and had repudiated the contracts.

That on 30th August, 1894, after due notice to the defendant, the plaintiffs caused the goods to be sold by public auction, when they realised £19 4s. 8d. net.

The plaintiffs claimed the difference between the price of the goods and that which they realised by the sale at public auction, viz., £11 13s. 4d. as damages, with interest *a tempore morae* and costs. In the second action the plaintiffs claimed £35 13s. 5d. and costs.

The first defendant pleaded that at the time of the sale Howson promised and agreed to deliver the goods not later than the end of April, 1894, and that the defendants would receive notice that the goods were forthcoming by the middle of April, 1894, and in the event of the notice not being received by the defendants, and the goods not being delivered by the said date, the order was to be considered cancelled. The order for the goods was given by the defendants upon this express condition and stipulation.

That the said notice was not received by the defendants, and the goods were not received by the end of April as agreed upon, and that thereafter the first defendant on 9th May, 1894, gave notice in writing to the plaintiffs, as he was entitled to do, that the order for the goods was cancelled.

The replications joined issue.

Mr. Buchanan for the plaintiffs.

Mr. Graham and Mr. Benjamin for defendants.

Robert Howson deposed that he had been a traveller for the firm of Hamilton, Clements & Co. for eighteen months in South Africa. He reached Van Rhyn's Dorp on the 19th February last year. Mr. Gert van Rhyn came to him and looked at his samples. Witness told him it would take about three months to get goods out from England. The day after he met Vos and discussed business in the same way. Mr. Vos subsequently said he would not order them as he wanted the goods to come out with Mr. Van Rhyn's, so as to save charges. On the 21st the defendants both called on witness and ordered goods. There was no specified time mentioned within which the goods

were to be delivered. It would have been impossible to guarantee delivery within a certain time. Goods ordered on 21st February in Van Rhyn's Dorp could not possibly be got out by the 14th April. The goods were ordered to be delivered at the Cape Town Docks. The defendants did not appear to be in any hurry. He sent the order on by the post that afternoon. Some further goods were ordered on the night of Wednesday, 21st, after the post had left. Witness went to Garies, in Namaqualand, and returned to Van Rhyn's Dorp in a fortnight, when Mr. Van Rhyn gave him another small order. It was agreed that the goods were to come out under one name, but Vos's and Van Rhyn's goods were to be separately packed. Witness sent the order to his partner in Cape Town, he to forward it to Europe. It was not the custom in his business to guarantee delivery within a short space of time. He was to draw against Vos for all the goods. Did not know when the goods were delivered.

Cross-examined by Mr. Graham: Received no commission at all from his firm; only salary and expenses. Told the defendants the charges on getting out goods would be 22½ per cent. to 25 per cent. on the cost. They did not say that the orders should be cancelled if delivery was not made by the end of April. Did not seem at all anxious about the time of delivery. Had a commercial traveller's licence of £25. Sometimes, but very rarely, sold his samples. The goods were to have been delivered to defendants' order at the Cape Town Docks, but no time was stated. Witness's firm was to advise them on arrival, and they were then to say whether the goods were to be sent via Thorn Bay or Piquetberg-road. Vos knew in a general way what Van Rhyn had ordered, and Vos said the goods were to come out in one lot. Vos told him to draw on him for the whole of the goods and they were all to be sent in his name. Did not know that the defendants were previously absolutely ignorant about ordering goods from Europe.

Mr. Graham produced a letter from Vos, dated 9th May, cancelling the order on account of delay in delivery and a reply from plaintiffs stating that the cancellation was unreasonable, and that the goods were then on the water. Also many other letters from the plaintiffs to Vos, asking for instructions as to forwarding the goods from Cape Town. Finally, on the 30th August the plaintiffs sold the goods by auction at defendants' risk.

Cross-examination continued: A farmer appeared while he was negotiating with the defendants at the time of the order, but he was not present in court.

Re-examined : The goods were miscellaneous, and not specially required for any season of the year. Bought a horse from Van Rhyn for £15, and he soon after had to sell it for £3. It was a very bad horse.

By the Court : Defendants knew for whom he was travelling. It might have been possible to get the goods out in two months, but it was rarely done under three months.

Arthur Clements deposed that the last witness was a traveller for his firm. It was not the custom in his trade to guarantee the delivery of goods at so early a date as six weeks from England. The goods arrived on the 11th May. It was the quickest time his firm had ever got goods out from England. Supposed it was because the goods were in stock. His contention was that the goods were delivered within a reasonable time.

This closed the case for the plaintiffs.

Jacob Jacobus Vos, a tailor at Van Rhyn's Dorp, said he first began to negotiate with Howson about buying the goods on Tuesday morning, 20th February of last year. Howson said the goods would be in Cape Town by the middle of April, and that if they did not come by that date witness need not take them. Would not have given the order had Howson not given this guarantee. Nothing was said about witness paying for all the goods. Did not make any such arrangement with Mr. Van Rhyn. It was only stipulated that their goods must arrive together.

Cross-examined : Never ordered goods from England before. Insisted on Howson guaranteeing the delivery, and he gave the verbal guarantee. Wrote to plaintiffs on May 9 cancelling the order. Had not the slightest idea about the time the steamers took to arrive from England. Did not know what was the day of departure of mail steamers. Promised to call on Mr. Clements in Cape Town, and went to Cape Town shortly after the order was given, but did not call and impress on Mr. Clements the urgency of the affair.

By the Court : Was anxious to have the goods at the stipulated time, but he did not write to the plaintiffs at once when the time had expired, because Howson had agreed that the order should be cancelled. Plaintiffs replied on 11th May that he could then have the goods. Business was good at that time, but witness would not then take the goods, because he had had to buy the goods elsewhere.

The Chief Justice said the witness should produce invoices showing he had bought goods elsewhere before 9th May.

Daniel Peter Grystenberg said he heard Howson tell both the defendants that he would have

the goods in Cape Town by the middle of April, and delivered in Van Rhyn's Dorp by the end of April. If not, he would not force them to take delivery, but would go "smousing" (hawking) with them.

Cross-examined : That was all he heard pass between Howson and defendants. Did not hear the other part of the arrangements.

Gerhardus van Rhyn said that when the order was given Howson said he could send it on by post that day to Cape Town, and the goods would be in Van Rhyn's Dorp by the end of April. They were to be in Cape Town, and Howson was to advise witness two weeks before the end of April, asking for instructions as to forwarding. Wanted the goods in the beginning of May, because that was a good time for business. Asked Howson more than once, and he replied that the goods would positively be there by the end of April; if not, he would go "smousing" with them. He told Howson distinctly that if he could not guarantee such delivery he would not give the order, and Howson replied that if the goods were not in Cape Town by the middle of April he could consider the order cancelled.

By the Court : Did not know at the time that on May 9 Vos wrote to plaintiff cancelling the order, nor did Vos come to witness with the letter he received in reply. In fact, they did not talk together about it.

Cross-examined : He gave an additional order a week later, and the goods were all to be packed together. It did not strike him that it would be an impossibility to get the goods out in six weeks. He relied altogether on what Howson said on that point. In consequence of the non-arrival of the goods he had to buy locally.

By the Court : Knew by the end of May that his goods had arrived in Cape Town. Received the goods he bought in substitution on the 14th June.

Peter Jacob Albert Bonthuis said that he was present at the time the goods were ordered, and heard Van Rhyn say distinctly to Howson that it would be no good ordering unless the goods could be in Cape Town by the middle of April.

Cross-examined : Did not know Van Rhyn had to order any goods from others, as Howson's goods had not arrived.

Nicolas Hendrik Mostert, a farmer, deposed that he was in Howson's sample-room when he heard Van Rhyn ask Howson if he would guarantee the goods being in Van Rhyn's Dorp by the end of April. Howson replied that he would, and that if they did not arrive in that time he would take the goods over himself from the firm, and go "smousing."

Mr. Howson was again put into the box, and examined by the Chief Justice: He had experience as a commercial traveller in England. He never left a copy of the order with his customers, but his practice in South Africa had been to get a copy of the order signed by the customer. Did not do so in this case, as he was pressed for time. Nothing of the kind stated by Mostert took place between witness and Van Rhyn. Never led the defendants to believe that the goods would be in Cape Town by 14th April.

Mr. Vos (also recalled), examined by the Chief Justice, said that on receiving the letter and invoice from the plaintiffs first of all, he did not at once go and show it to Van Rhyn. Did not do so because he lived at the other end of the town.

After argument.

Judgment was given for defendants with costs.

The Chief Justice said: I confess I have had great difficulty in arriving at a decision in this case. It is quite true that on one side we have only the evidence of one witness and on the other side that of five witnesses, but questions of fact must be decided not so much by numbers as by weight. The probabilities of the case *prima facie* appear to me to be somewhat in favour of the plaintiff, but there is this unfortunate omission in the plaintiff's conduct, that is that he did not at the time have the order signed by the defendants. It was his custom in other cases; it had been his custom in other cases to get his purchasers to sign orders, but in this case he unfortunately omitted to do so. Now we have more than once said that although the Statute of Frauds does not apply in this colony, and that a purchase of goods to the amount of over £10 can be entered into orally, still it must be proved clearly to the satisfaction of the Court that the purchase was made, and if the matter is left at all in doubt, the presumption is against the alleged purchase and if the plaintiff does not fortify himself by a written contract he has only himself to blame if any injustice befall him. Now I am not prepared to say that Howson comes into court to perjure himself. I firmly believe that he believed what he said to be the truth, but I think it is quite possible that he was mistaken, and that in his hurry to get through his business he may have stated and made promises which he has now forgotten, and which he forgot to mention to his principals when he forwarded the order, because we cannot lose sight of the fact that some of the witnesses on the other side are perfectly respectable, and one of them (Mr. Mostert) is not connected with the parties in any way, and as far as the Court can

judge is perfectly impartial. Well, Mr. Mostert said he heard the conversation between Mr. Howson and one of the defendants, which if true clearly proves the case for the defendants. Then Mr. Bonthuis and Mr. Grystenberg fully support the evidence given by the defendants. Well, if that evidence is true it is quite clear that the plaintiff's evidence cannot be relied upon, but I am perfectly certain that Howson does not come to the court with the object of stating what is not true. I believe he is mistaken as to what took place, and that he gave the parties to understand that the goods would be here on the 30th April, and that it was a condition of the sale that they should be so delivered. Under the circumstances I regret to say that in my opinion judgment must be for the defendants with costs.

Mr. Justice Buchanan: I concur on the ground that the onus of proof lies on the plaintiff. In this case it is possible that Howson may have made a mistake, and if judgment were given in favour of the plaintiff it could only be on the grounds of the wilful and corrupt perjury of the witnesses for the defence. I think a great deal can be said in favour of the plaintiff's case, but the onus of the proof lies on the plaintiff, and such proof has not been forthcoming.

Mr. Justice Upington: I have also arrived at the conclusion that the defendants are entitled to succeed, but I must say I have arrived at that conclusion with great hesitation.

At the request of Mr. Graham defendants were allowed their expenses as witnesses.

[Plaintiff's Attorney, — Gibbon; Defendants' Attorney, G. Montgomery-Walker.]

NEWMAN V. EAST LONDON TOWN COUNCIL. 1895.
Feb. 12th.
March 5th.

Negligence—Liability of Town Council—Contributory negligence—Contractor's negligence—Proximate cause.

Where two or more acts of negligence have contributed to cause an injury the test of liability for each act is whether the harm complained of is such as a reasonable man should have foreseen as likely to happen.

The liability of one person for his act does not exculpate another person whose negligence has contributed to an injury which he ought to have foreseen as likely to happen.

The Town Council of East London having engaged a contractor to re-construct a road and to make an excavation immediately

adjoining the road, the contractor's servants left some casks of cement standing on one side of the road and placed some large stones near the excavation on the opposite side.

The plaintiff's horse, being driven past the casks, shied at the casks and bolted towards the excavation.

When one of the wheels of the cart was a few inches from the excavation the plaintiff jumped from the cart and alighted upon a stone.

The horse and cart moved on and escaped unhurt, but the wheel of the cart struck the plaintiff's leg and broke it.

Held, on appeal from the East London Circuit Court, that, although the horse may in the first instance have shied at the casks, if the excavation was improperly made and then left unfenced by the defendants and they ought to have foreseen danger from their negligence, they would have been liable if the plaintiff had fallen into the excavation.

Held, further, that if the plaintiff in jumping from the cart did what a reasonably prudent man, impelled by the instinct of self-preservation, would have done, he was not guilty of contributory negligence and the injury is legally attributable to the existence of the improper excavation, although the contractor may also be liable for improperly placing the casks in the street.

This was an appeal from a judgment of the last Circuit Court held in East London, in an action in which the present appellant (plaintiff in the lower Court) sued the Mayor, Councillors, and townsmen of East London for £2,500, damages for negligence.

The plaintiff's summons was in the following terms :

1. The defendants are the Municipal Council of East London, and as such, vested with the control and management of all roads within the Municipal limits of the Municipality of East London, and are the right parties to be sued in this action.

2. On or about the 1st August, 1893, the defendants were repairing and constructing a road, known as the St. Peter's-road, within East London.

3. The defendants, in breach of their duty to carry on all operations on a road left open for traffic in a manner consistent with the safety and protection of persons passing along the

said road, negligently and carelessly placed several casks of cement with a loose sail over them on one side of the road, and dug a deep hole or excavation, and placed a heap of large stones near the said hole on the other side of the road, leaving a distance of about 14 feet between the said casks and the said hole and stones.

4. The said hole or excavation was not fenced off in any way, and the sail upon the said casks was not properly or securely fastened.

5. By reason of the said careless and negligent acts of the defendants the plaintiff's horse, drawing in a cart, in which plaintiff was driving on the said 1st August, 1893, was, on coming up to the said casks, suddenly frightened by reason of the said sail flapping, and swerved and ran away with said cart directly towards the said hole and stones.

6. Plaintiff, to save himself from being precipitated into the said hole, which he saw no chance of the cart escaping, jumped from the said cart, and in doing so fell against the said stones already referred to, and had his leg completely broken in two places.

7. The plaintiff has suffered damages in the premises, in pain, permanent injuries, medical expenses, and loss of business, in the sum of £2,500, which defendants refuse to pay.

8. Wherefore plaintiff prays : (a) Judgment for £2,500 and interest *a tempore morae*; (b) general relief and costs of suit.

The defendants pleaded as follows :

1. The defendants deny every allegation of fact and conclusion of law in the plaintiff's declaration contained, and joins issue thereon with the plaintiff.

2. And for a special plea, the defendants say that on or about the 17th day of July, 1893, the defendants entered into a certain contract with one Charles Ford, which contract was, however, only signed on the 2nd day of August, 1893.

3. Under the said contract, the said Charles Ford was an independent contractor, and free from all control by the defendants.

4. The acts and omissions complained of in the third and fourth paragraphs of the plaintiff's summons, if they were actually done and caused, were done and caused by the said Charles Ford, independently of the defendants, and without any interference or control by the defendants.

5. And for a further special plea, in case the above should be deemed insufficient, but not otherwise, the defendants say that the plaintiff was guilty of contributory negligence, inasmuch as the plaintiff, without any necessity or just cause, jumped out of his said cart on to the said stones.

6. The injury, if any, sustained by the plaintiff, was due to his said contributory negligence, and not to any negligence on the part of the defendants.

7. The defendants pray that the plaintiff's claim may be dismissed, with costs of suit.

The following are the material clauses of the contract entered into between the Town Council and Ford :

3. The Mayor and Councillors reserve to themselves the right of deviating from the plans and specifications, either by adding to or diminishing therefrom, without vitiating this contract, the value of such addition or alteration to be ascertained by measurement and added to or deducted from the amount of the contract at the prices specified, and the orders for which additions or diminutions shall invariably be in writing, signed by the Clerk of Works.

5. The contractor is to remove, at his own cost, any materials or rubbish which may result from the execution of the work, within such period, and removed to such place, as shall be directed by the Clerk of Works.

6. If it shall appear to the Clerk of Works, that any work has been executed with unsound or imperfect materials, or unskilful or imperfect workmanship, the contractor shall rectify and reform, or reconstruct the same, in whole or in part, as the case may require, at his own proper cost and charge, and in the event of his refusing so to do within the period specified by the Clerk of Works, or to take back any materials or articles which may be considered by the said Clerk of Works to be unsound, of bad quality or not agreeable to the terms of this contract, and to provide immediately suitable material in lieu thereof of those condemned, then the Mayor and Council shall be at liberty forthwith to employ other tradesmen to perform the work and to cause the material to be purchased; and any excess of expense thereby incurred to be defrayed by the contractor and to be deducted from any sums due, or to become due to the contractor from the Municipality, or he may be called on by the Municipality to refund the same; and in case the contractor shall refuse to do so, then he shall forfeit his contract.

7. The Mayor and Councillors, or any person deputed by them, shall at all times be allowed to inspect the works in progress.

8. No portion of the work is to be sublet, unless permission be given in writing by the Mayor.

9. The contractor, his agent, or a duly qualified foreman is to be in daily and constant attendance upon the works.

10. The contractor shall not continue to employ upon the works any artificers or labourers who may be found inefficient or inattentive, or who shall act improperly, and in case the contractor shall refuse to dismiss such objectionable persons, the Mayor shall be at liberty to stop the works.

11. The contractor shall complete the works within the period specified in the letter of tender, and in order to prevent inconvenience to the public service by improper delay on the part of the contractor, the following course is to be adopted: The Mayor and Councillors will stipulate the periods by which certain proportions of the works are to be completed, either at the commencement of the work or from time to time as it proceeds; and if the contractor should fail to complete the first or any subsequent proportion within the time stipulated by the Mayor and Councillors, the Mayor and Councillors are at liberty to discontinue the work forthwith, and to employ other persons to execute the remaining proportion; and any extra expense that may be incurred by this proceeding shall be paid by the contractor on demand of the Mayor and Councillors.

CONTRACT.

The contractor is responsible for all damage to persons or property arising out of this contract, and in the event of accident to persons, cattle, horses, sheep, or stock of any sort from insufficient protection, the contractor shall indemnify the Council from all claims on account thereof.

The facts appear from the judgment of the Judge-President, which was as follows :

Plaintiff, an auctioneer, broker, and shipping and forwarding agent, East London, sues the East London Town Council for £2,500 as damages for an injury sustained by him on 1st August, 1898. The plaintiff alleges that on that day the Council, being vested with the control and management of all roads within the Municipal limits of East London, were repairing and constructing those in the road known as St. Peter's Road, and, in breach of their duty, placed several casks of cement with a loose sail over them on one side of the road, and dug a deep excavation and placed a large heap of stones near it on the other side of the road, leaving a distance of about 14 feet between the casks and hole and stones, the excavation not being fenced nor the sail securely fastened. By reason of these negligent acts, plaintiff's horse, drawing a cart in which plaintiff was driving, was suddenly frightened by the sail flapping, and swerved and ran towards the stones. Plaintiff thereupon, to avoid being

precipitated into the hole, jumped from the cart, and, in doing so, fell against the stones and broke his leg. The defendants, after pleading generally, pleaded specially that on the 17th July, 1893, they entered into a special contract with one Charles Ford, which was signed on the 2nd August. Under it Ford was an independent contractor and free from all control by defendants, and that if the injuries alleged were caused, they were caused by Ford independently and without any interference or control on the part of the defendants, who further specially pleaded that plaintiff was guilty of contributory negligence, because, without any necessity or just cause, he jumped out of the cart on to the stones, and that if any injury was sustained it was due to plaintiff's contributory negligence and not to any negligence on the part of the defendants. I find the facts to be these: In July, 1893, defendants contracted with Charles Ford to widen St. Peter's Road, at that time 33 feet wide, at the spot where the injury was subsequently sustained. Ford thereby agreed, at his own cost, to execute the whole of the work according to the planned specifications, and to work in a workmanlike manner to the entire satisfaction of defendant's Clerk of Works. Ford agreed to accept the decision of the Clerk of the Works on all points connected with the work and material. The Council agreed to pay Ford £24 per English chain for every chain of roadway constructed according to specification, the Clerk of Works being the sole arbitrator as to the nature of the work, soundness, and material. The defendants reserved the right of deviating from the plans and specifications, the contractor to find all tools, tackle, carriage and cartage, and to remove, at his own cost, all material and rubbish which may result upon execution of work; but, if it appeared to the Clerk of the Works that the work was unsound, or material imperfect, the contractor shall reconstruct as may be required by the Clerk of the Works; failing to do so, the defendants should be at liberty to employ other tradesmen to perform the work. Acting under this contract, Ford was to continue an excavation at a dip in St. Peter's Road, and building stones were placed near this excavation, occupying about six feet of existing road abutting on the excavation. On the other side of the road and occupying about three feet of that roadway, he placed some barrels of cement and covered them with a sail. This was done on the 31st July, 1893. No barrier was placed between the old road and the excavation, but, in the day time, the excavation, loose stones, and the barrels of cement were very clearly visible, and a space

of about 25 feet was left open for the traffic. On the 1st August, plaintiff was travelling along this road in his buggy, accompanied by his nephew, a lad of fifteen, and, as he approached that part of the road where barrels of cement were lying, his horse shied at the cask and bolted in the direction of the stones and excavation. Fearing injury, the lad jumped out with his uncle's approval and escaped unhurt. Plaintiff acting as he thought for the best, followed the lad's example, and jumping out fell on the fringe of the stones, where his leg was broken. The horse carried the cart on, which was not upset but stopped by a tree not far off. Plaintiff was in consequence a sufferer for three months, and has not quite recovered the use of his leg. That morning, on going to business, plaintiff had passed the same spot, when the casks and stones were already there. The plaintiff's contention is that Ford was not an independent contractor, and that there was negligence in placing the casks and stones where they were, and also in making the excavation without sufficient protection; that the horse was not to blame nor the plaintiff; that the injury was caused by a combination of circumstances beginning with the improper position of the barrels which caused the horse to shy and bolt; and bolting, the plaintiff was obliged (to save himself from being precipitated into the excavation) to jump out, and, jumping, injured himself against the stones improperly placed where they were; that inasmuch as Ford was not an independent contractor, the defendants are liable, having undertaken the reconstruction of the road; that even had Ford been an independent contractor the defendants would have been liable, inasmuch as they did not contract in a manner to secure the safety of the public, and that the contract itself necessitating the excavation, the defendants cannot be allowed to screen themselves from liability of their agent under the contract.

The defence is, first, that plaintiff was the unfortunate victim of a pure accident; and secondly, that if there is liability anywhere, it is in Ford, who was an independent contractor; that, even if the excavation was contemplated by the contract, the public ought to have been warned of its existence at night by lamps and barriers (there was no necessity for doing so in the day time, when it was clearly visible); and that at most could the injury be attributed to the scare caused to the horse by the temporary placing of the cement casks on the edge of the road, which was an act not contemplated by the contract with Ford. The rule of law undoubtedly is that the

master is answerable for the acts or omissions of servants or workmen, while pursuing the course of their employment, and the principal is not answerable for acts or omissions of his agent, to whom the execution of a work is committed without any control or power of direction being reserved as to the manner of executing the work. (*Taylor v. Greenhalgh*, L.R. 9, Q.B. 487, and *Pendlebury v. Greenhalgh*, 1 Q.B.D., p. 36.) In such a case the contractor alone is responsible for damage done by him in execution of the works (see *Wilfare v. Brighton Railway Co.*, L.R. 4, Q.B. 696), but this rule does not apply to cases where the act causing the injury is an act which the contractor was employed to do, or a necessary consequence of the work committed to him. Nor is the employer exempted if he commits to the contractor the performance of a duty incumbent on himself (see *Picard v. Smith*, 10 C.B. (N.S.), 480, and *Tarry v. Ashton*, L.R. 1, Q.B. 314). In the present case, however, I come to the conclusion that Ford was an independent contractor to whom the execution of the work was committed, without control as to the manner of executing it, and that the defendants are not responsible for Ford's act in placing the cement casks and stones where they were placed. In coming to the conclusion that Ford was an independent contractor, I apply this test: Did the contract provide for the interference by the Council in the disposition of the stones or cement? No doubt, as caretakers of all roads, the Council had the right to interfere with anyone (and, therefore, with Ford) in disposing of anything in such a manner as might become a nuisance; but in order to establish the relation of master or superior in the present case, the contract itself must have provided for the control by the defendants in this particular matter over Ford. In my opinion the contract does not. The right to control implies the power to discharge the servants if they had placed the casks and stones where they did, contrary not to Ford's but defendants' orders, or to cancel the contract with Ford for a similar act of disobedience. This I do not think the contract provided. On the other hand the evidence proves that the excavation was a necessary consequence of the work committed to Ford, and that inasmuch as there was nothing in the contract providing for the protection of the public during the course of the construction of the new culvert, which necessitated the construction of this excavation at one side of the road, I think defendants might perhaps have been liable in law, if during the night time the injury had been caused in consequence of no proper indication by lights or

otherwise of the presence of the excavation; but that is not the present case. The injury in the present case was either the result of pure accident, or the negligence of Ford and his servants in placing the cement casks on the side of the road. The unprotected excavation cannot be blamed. The plaintiff was hurt because he had lost control of his scared horse, and had there been (instead of an excavation) a lamp-post against which he feared to be dashed, the lamp-post could not have been said to be the cause of the hurt if plaintiff had jumped to avoid it. Either the horse was to blame for shying and bolting unreasonably, or those who by unreasonable conduct caused the horse to shy. In coming to the conclusion that blame cannot be attributed to the excavation, I would refer to the following case as showing that the damage should only be attributed to a defect in the horse or the presence of the casks. In *Scott v. Sheppard*, one of Smith's leading cases, defendant threw a lighted squib into a crowd. It fell upon the stand of one Yates, who to prevent injury to himself and wares threw it across the market house, where it fell upon the stand of one Ryall, who threw it to another part of the market, where it struck plaintiff. It was held that defendant who started the squib was liable in trespass, and although the case is a leading one principally to show the difference between case and trespass, there was never any question of liability in defendant as being the proximate cause of the injury. Also in *Bailiffs of Ramsey Marsh v. Trinity House*, where a ship becoming unmanageable through the neglect of the captain three-quarters of a mile from the lee shore, drifted ashore, and damaged the plaintiff's sea wall, it was held that the neglect of the captain was the proximate cause of damage. Again, in the case of *Lawrance v. Jenkins*, 8 Q.B.D., 274, and the case of *Sneezeby v. Lano and York Railway Co.*, 1 Q.B.D., 42, where defendant company was held liable for the consequence of their servant's act, in negligently sending some empty trucks down an incline into a siding, which frightened a herd of cattle travelling along a road, and which cattle were afterwards killed on another part of the railway—this was held to be the natural consequence of the negligent act of the company's servant. Again in the case of *The Sisters*, 1 P.D. 117, where a vessel by improper navigation compelled another to alter her course, and in so altering it she came in collision with a third, the first ship was held liable to the third for the damage caused. See also *Clarke v. Chambers*, 3 Q.B.D., 327; and *Harris v. Mobbs*, decided in the Common Pleas Division, 1878, where defendant had left a van with

ploughing gear on the grassy side of the road to stand there for the night. The deceased drove by along the road, and his mare, who it appeared in evidence was a confirmed kicker, shied at the thing and then kicked and ran away, upsetting the deceased and kicking him, so that he died; it was held that the act of Mobbs in leaving the van was an unreasonable use of the highway, and that the death was the proximate and natural result. I quote these cases not so much to show that Ford was liable, as to illustrate the reasonableness of defendants' contention that the excavation cannot be blamed as the legally proximate cause of the hurt. It is not necessary for me to determine that Ford was liable. He is not before the Court, and that alone should be a sufficient reason for not expressing an opinion on his liability, unless it were absolutely necessary to do so for the purposes of this case. Certainly the case of *Walters v. Lucas*, 7 Juta, 153, is in many respects similar to the present one, and there the Supreme Court held that the hurt was caused by placing two bundles of wood on a highway, which caused a horse to shy and injure plaintiff, did not give a right of action, the hurt being attributed to accident and not neglect. In that case the servant of defendant had placed a bundle of wood at the side of a road only six yards wide and in a place which he himself said he thought dangerous (at that sharp turn) to horses suddenly coming up to it. This was the opinion of another man who passed the spot; and defendant himself on hearing what his servant had done, said: "You stupid, could you not find another spot?" Notwithstanding all this the Chief Justice supported the judgment of the Magistrate, that plaintiff's tame horse taking fright at the bundle and upsetting plaintiff's cart did not entitle plaintiff to damages, saying that the man who placed the bundle there "could not be reasonably expected to have foreseen that a pair of horses would take fright at it." It is impossible not to sympathise deeply with the plaintiff, and I do not express an opinion commending the manner in which the excavation was left open, but for the reasons already given, I am forced to the conclusion that the defendants are not in law responsible for the damage caused to the plaintiff. There must be judgment for defendants with costs. I may add that between the case of *Murray v. East London Municipality* and the present one there is no analogy, and that although I did not take part in that judgment, I concur in the conclusion and reasons for that decision.

From this judgment the plaintiff now appealed.

The Attorney-General (Mr. Schreiner, Q.C., with him Mr. Searle, Q.C.), for the appellant after stating the facts: In *East London Municipality v. Murray* the same contract and the same point were in issue as in the present case and the Municipality was held liable. If *Murray's Case* was good law then the appellant must succeed in this case. The defendants are a statutory body and their liability must be ascertained by the powers conferred on them. As to those powers, see Act 23 of 1880, section 36.

It is no answer to the plaintiff's claim that the work was not done departmentally. It would be a monstrous state of the law if a public body could escape liability by the employment of an independent contractor who might be a mere man of straw. But the contract entered into between the Town Council and Ford shows that the latter was not an independent contractor (see clauses 5, 6, and 10 of the conditions), and also the provision as to the contractor being bound to indemnify the Council from all claims arising from damage in the event of accidents to persons, cattle, horses, &c.

There was no contributory negligence on the part of the plaintiff, who was justified under the circumstances in jumping from the cart as he thought his life was in danger, and there is evidence to show that if he and Miller had remained in the cart it would have fallen into the excavation.

The following authorities were cited and discussed: *Pendlebury v. Greenhalgh* (1 Q.B.D., 36); *Taylor v. Greenhalgh* (9 A.B., 487); *Tarry v. Ashton* (1 Q.B., 314); *Conley v. Newmarket Local Board* (L.R., App. Cases (1892), 245); *Borough of Bathurst v. McPherson* (L.R. 4, App. Cases 256); *Bower v. Pele* (1 A.B.D., 34); *Voet* (9, 2, 3, 9, 2, 12).

Mr. Rose-Innes, Q.C. (with him Mr. Webber) for the Town Council: The first point in this case is the legal one whether even if there was negligence on the part of the contractor the defendant Council is liable. There is not much authority in the R.D. law on the subject. It is clear, however, by that law, as by English law, that a master is liable for the delicts of his servants in the course of their employment. *Voet* (9, 4, 10). But with regard to delicts committed by those who stand in some other relation to a *pater familias* than that of servants, liability does not attach in the same way. *Voet* (9, 3, 1), *Potier on Obligations* (Pt. 1, ci., note 121), says that those who have another under their authority are liable for the delicts of such person when it was in their power to prevent the act but not otherwise.

Veet (9, 2, 12) is somewhat to the same effect. He says that they are only liable when they might and ought to have prohibited the act and did not do so.

From these authorities one is justified in inferring that the Dutch law agrees with the English on the general rule that where a lawful act is committed to the charge of an independent contractor the employer is not liable for the contractor's torts in the course of the work. See the exceptions to this rule in *Underhill on Torts* (p. 55).

It is clear upon reading the contract that Ford must be looked upon as an independent contractor. He was dealing with the Council at arm's length and was in no sense of the word in their employment.

The Municipal Clerk of Works was in the position of an architect. The work was to be done to his satisfaction and payments were to be made on his certificates. If unsound work were done he could order it to be reconstructed, and he could under the authority of the Council order alterations from the plans. These are powers generally given to an architect, but they do not prevent a builder from being an independent contractor. But then it may be said that the Mayor had power to compel the dismissal of improper workmen. That does not alter the case, it does not make the Council responsible for the torts of workmen who up to that time had not acted improperly. That power was conferred upon the Mayor to provide against bad workmanship. See *Rudie v. L. & N.W. Railway Co.* (L.R. 4, Ex., 244).

With regard to the indemnity clause that was put in for safety sake. It does not alter the legal position of the Council. The indemnity was only necessary if the Council was legally liable, the fact of their stipulating for an indemnity does not fix them with liability. See *Thompson on Negligence* (Vol. II. p. 739) cited by Jones J. in *Murray's Case*. The contractor or his foreman had to be in daily attendance, so that we contend that Ford occupied under the agreement the position of an independent contractor, and that there was no obligation on the Council to interfere with the daily details of the work.

Supposing that to be so we next come to inquire whether any duty was by law imposed upon the Council which the contractor did not perform, and which therefore the Council would be liable for. That duty is imposed either by common law or by statute, and there are English cases on both. As an instance of duty by common law, see *Tarry v. Ashton* (1 Q.B.D., 314) as an instance of statutory liability, see *Gray v. Pullen* (5 B. & S., 970). In the latter case the

statute which gave A. the authority to open the roads expressly provided for filling them up in a certain way. A. did not fill up the roads in the manner required by the statute and was held liable for the consequences—contractor or no contractor. But what statutory duty is imposed on the Council in this case? See Act 23 of 1880, section 36. The Council has the power to construct and alter the roads, not the *duty* or doing so but only the *power*. See *Partridge's Case* (4 Juta, 300.) But if they do any work the duty is cast upon them of seeing that the work is properly done so as not to injure others, therefore if in executing these alterations they had done them badly they might be liable. But they are not compelled to do alterations with their own staff. They can entrust the work to a contractor and there is no duty on them with regard to the capacity or prudence of the contractor's workmen. No English case can be quoted which goes to that length. The act which the Council did was perfectly lawful and they are therefore not responsible for the acts of the contractor. See *Ellis v. Sheffield Gas Co.* (2 E. & B., 767). See also *Welfare v. Brighton Railway Co.* (L.R. 4, Q.B. 693).

If the Court should be against us on the first point then the merits of the case must be discussed, and we must then consider the question as if the Council had undertaken the work itself.

What are the facts proved, the road was 33 feet wide, the culvert already existed with a fall of several feet. The Council desired to widen the road and therefore to enlarge the culvert. The barrels of cement with sail over them took up 3 feet, the stones near the excavation occupied 6 feet, the traffic did not go within 5 feet of the excavation, so that there was a space of about 25 feet left for the traffic. Where was the negligence? It could only be in respect of one of three things: (1) The excavation, (2) the stones, (3) the cement barrels. Now the excavation can be dismissed, it was in no way the cause of the accident. The cart did not fall into it and the plaintiff jumped out after he had passed it. See plan. It may have frightened the plaintiff, but so would a lamp-post there or an iron railing. Then was it the stones and cement? It is impossible to repair any road on a large scale without taking up some part of it and depositing rubbish or stones upon it. These stones extended 5 or 6 feet into the road, and they were a guard to the culvert if any person was coming the opposite way to what the plaintiff went. Now what is the proper test to apply in deciding whether placing stones there amounted to

negligence, and this applies equally to the matter of the cement barrels. Negligence is the omission to do what a reasonable man would do, or it is the doing of which a reasonable man would not do. A man is not expected to guard against what a reasonable man would not expect to occur. See *Pollock, C.B., in Greenland v. Chaplin* (5 Exch., at p. 248).

Applying that rule, could anyone have foreseen that placing stones or cement at a distance of 6 to 7 feet from the ordinary traffic marks would cause any accidents during daylight? It is submitted not. See *Walter v. Lucas* (7 Juta, 155). The plaintiff himself did not think that the horse would shy at the cement barrels, of course now that the accident has happened it is easy to be wise after the event. But could any reasonable man have thought that 6 or 8 barrels of cement would cause a horse to shy, or that if he did shy he would run right over the stones? But supposing that it is held that there was negligence in regard to the placing stones and cement on the road, was the damage so connected with such negligence that the plaintiff can recover? Each case depends upon its own facts and some of the decisions are hardly reconcilable. See *Sharp v. Porrell* (L.R. 7, C.P. 253). *Lawrence v. Jenkins* (L.R. 8, Q.B. 274). But it is not at all clear what caused the horse to shy. It is assumed that it was the flapping of the sails, but two of the witnesses are very clear that it was due to a piece of paper. The learned judge does not say that he does not believe these witnesses. If the accident were caused by the paper could the defendants be expected to have foreseen this, and to have abstained from placing the stones where they were placed?

As to the conduct of the plaintiff, neither the cart nor the horse was injured, and in all probability he would have escaped unhurt if he had remained in the cart.

Very little evidence of damages was given.

Mr. Searle, Q.C., replied.

Cur. ad vult.

Postea (March 5th).

The Court delivered judgment.

The Chief Justice gave judgment as follows: The plaintiff brought an action against the East London Town Council in the last Circuit Court for East London for damages sustained by him under the following circumstances: He was driving a horse which shied at some casks of cement covered by a flapping sail and lying within, but on one side of St. Peter's-road. The horse bolted in the direction of a deep excavation on the opposite side of the road, and the plaintiff, fearing that the cart might be overturned into the excavation, jumped out and

alighted on some stones lying within the line of traffic near the excavation. He slipped, and the left wheel of the cart broke his leg against a stone. The summons alleges, in effect, that the defendants were guilty of negligence in allowing the casks and stones to be improperly placed in the road, and in allowing an excavation, deepened by themselves, to remain unprotected on the very edge of the road, and are therefore liable for the resulting damages. The defendants plead that the acts complained of had been committed by an independent contractor, and that, even if the defendants are responsible for the contractor's acts of negligence, the plaintiff was guilty of contributory negligence in jumping out of the cart without necessity or just cause. The learned Judge-President, in his very able and interesting judgment, supported the first plea, holding that the casks had been placed in the road by the contractor, and that the defendants had no power of control over him. The judgment accordingly was for the defendants, and against that judgment the plaintiff now appeals. Under the contract for the reconstruction of St. Peter's-road, large powers of supervision were reserved to the defendants. They had the right at all times to inspect the works in progress, and to stop the works in case the contractor refused to dismiss objectionable labourers. The work itself was to be done to the satisfaction of the Municipal clerk of the works. If the contract does not specifically give him the power to prevent the contractor from placing materials required for the reconstruction in the road, that power certainly belonged to the defendants as the body having control over the streets. The possibility of the Council being held liable for damages, such as are now claimed, was foreseen, for one clause of the contract provides that "the contractor is responsible for all damage to persons or property arising out of the contract, and in the event of accident to persons, cattle, horses, sheep, or stock of any sort from insufficient protection, the contractor shall indemnify the Council from all claims on account thereof." It is not quite clear to me under these circumstances that the defendants are not responsible for the placing of the cement and stones in the road. But assuming that the negligent acts of the contractor were not the acts of the defendants, the obvious question arises, why did they not adopt some precautions against such negligent acts? I can well understand the doctrine that a person who employs an independent contractor upon works which in the ordinary course would entail no danger to the

public, is not liable for incidental injuries caused by the contractor's negligence. But where, as in the present case, the work is to be performed upon and near a public road, and it may reasonably be anticipated that, without due precautions, the safety of the public using the road will occasionally be endangered by the carelessness of the workmen, it is surely an act of negligence to order the work without the precautions. The Council might have reserved, if they did not reserve, the right of pointing out the spots where stones and other materials were to be placed; they might have made a fence to prevent the excavation from being a source of danger, or they might have adopted the alternative course of closing the road whilst the work was in progress. This latter power is expressly reserved to them by one of their own bye-laws (64). It is quite possible to conceive cases in which, by our law, an employer would not be legally liable for acts of negligence committed by an independent contractor, but the present does not appear to me to be such a case. After authorising the reconstruction of the road without taking any precautions to avert dangers which might reasonably have been foreseen, and which they apparently did foresee, they cannot shelter themselves behind the terms of their contract. The causes which contributed towards injury were threefold; the position of the casks which caused the horse to swerve, the excavation which threatened the plaintiff with danger to life and limb, and, as a natural result of these two causes, the plaintiff's jumping from the cart in order to escape the danger. The last of these causes was the plaintiff's own act, and therefore, as I shall presently show, if it was a negligent act of his to jump, he is not entitled to relief. The learned Judge-President held that the excavation was "a necessary consequence of the work committed to Ford," the contractor. He held further, however, that the injury was attributable not to the excavation, but to the negligence of Ford's servants in placing the casks on the road. It appears to me, however, that both causes contributed to the injury. The defendants' witnesses say that the horse shied at a piece of paper blown across the road, and not at the casks. Now let me suppose that this view is correct, and that the plaintiff had been precipitated into the excavation, the unfenced excavation would certainly have been one of the causes of the accident. It is a legitimate inference that if the plaintiff was justified in jumping from the cart, the excavation was the cause of the accident. I can find no authority in our law for the view that if two separate causes contributed to an injury no one can be

held responsible. Nor does it appear that such is the law of England. Pollock (on Torts, p. 406) says: "It seems to be a question of fact, rather than of law, what respective degrees of connection, in kind and degree, between the damage suffered by Z and the independent negligent conduct of A and B will make it proper to say that Z was injured by the negligence of A alone, or of B alone, or of both A and B. But if this last conclusion be arrived at, it is now quite clear that Z can sue both A and B." If, in the present case, the plaintiff can sue Ford for the negligent placing of the casks in the road, it does not follow that he is debarred from the right of suing the defendants for their negligence in authorising the conversion of a shallow and sloping embankment adjoining the road into a steep and deep excavation. The difficulty in cases of this kind arises from the use of the term "proximate" cause, for of two successive causes only one can be strictly proximate. The term seems to have been borrowed in English law from one of Bacon's maxims, but I have not found it used in the Roman-Dutch law. The true test of liability for causing harm must after all be whether or not the harm complained of is such as a reasonable man should have foreseen as likely to happen. Applying that test the person who improperly placed the casks in the street may be liable, but his liability would not exculpate the person who improperly made the excavation if he, on his part, ought to have foreseen the danger of persons or animals falling into the excavation. It is true that the plaintiff did not fall into the excavation, but if there was a real danger which a reasonably prudent man, impelled by the instinct of self-preservation, would naturally seek to avoid by jumping from the cart, the injury occasioned by his so jumping out would be attributable to the existence of the excavation. In this view of the case the really important question is whether the plaintiff was guilty of contributory negligence, but before I consider it I wish to remark that the learned Judge-President has somewhat misunderstood the decision of this Court in *Walters v. Lucas* (7 Jut., 152). The servant of the defendant in that case had placed one bundle of wood—and not two bundles as stated by the judge—in the veld about a yard from the road, and not "on the highway" as understood by the learned judge. The Court held that "the bundle of wood resembling as it did the bushes near which it was placed would not be calculated to frighten ordinary horses properly managed, and the placing it there cannot be looked upon as such a negligent act as to attach liability for the

damage." The decision is certainly not an authority upon the question whether, if the bundle had been improperly placed on the road near to a dangerous part of the road, the defendant would have been liable. In the present case the flapping sail which covered the cement probably frightened the horse. But for the horse being so frightened, the danger from the excavation would not have arisen. It may well be, therefore, that those responsible for the position of the casks are liable, but it does not follow that those who are responsible for the unprotected excavation are free from liability. The excavation was authorised by the defendants, and although immediately abutting on the high road, it was left unfenced. Might not persons of average competence and knowledge have foreseen the consequence which has ensued? Horses will occasionally swerve to the right or to the left of a road without any negligence on the driver's part. The deeper an excavation is on the side of a road the greater is the danger to the traveller who uses it, and the greater the danger the more inducement there is to avoid the danger by every available means. If the effort to avoid a danger is made without reasonable cause, the person injured has no remedy, because of his contributory negligence; but, as was remarked by an American judge in *Briggs v. Union-street Railway* (148 Mass., 72), "one should not be held too strictly for a hasty attempt to avert a suddenly impending danger, even though his effort is ill-judged." In the case of *Heffer v. Colonial Government*, decided in this Court in 1880, the executors of a person who had been killed in jumping against a lamp-post out of a moving train, recovered damages from the Government for the injury which caused his death. Owing to a defect in the points, the train went temporarily off the line near the Wynberg Railway-station. Those who remained in the train escaped unhurt, but the jury having found that there was no contributory negligence on the part of the deceased, the Government consented to judgment for the amount of damages awarded by the jury. As remarked by Pollock in his work on Torts, "that which appears the best way to a Court examining the matter afterwards, and with full knowledge, is not necessarily obvious even to a prudent and skilful man on a sudden alarm." In the present case, the Court below has not expressly found that there was no contributory negligence on the plaintiff's part, but I gather from the judge's reasons that he does not impute any blame to the plaintiff. The plaintiff himself says: "When I saw in my

opinion that there was no chance of avoiding a tumble into the excavation by cart and horse I considered it right to jump." A lad who was with the plaintiff at the time says: "When we got to the bottom of the decline the horse took fright at the casks, and bolted straight towards the hole. Plaintiff did his utmost to check the horse, and as he neared the hole I jumped out to the left, as I was afraid of falling into the hole. This was a little before we got to the excavation. When I turned round I saw plaintiff lying on the ground holding his leg. It was absolutely necessary to jump out to save ourselves." A mason who was working in the excavation says that its depth that day was nine feet, and its breadth nine to ten feet, that at this depth it ran up against, and to the road, and that there was nothing to protect it. He adds that he saw the plaintiff's cart come rushing past very close to the culvert, throwing some of the earth into the culvert and four inches from the hole itself. This he ascertained afterwards from actual measurement. "The left wheel," he says, "struck the building earth, which was hard, and lay there and slightly tilted the cart in the direction of the excavation. . . . I think if the men had been in the cart when it passed the hole and canted up where it struck the stone, it would have fallen into the hole, going as it did." One of the defendants' witnesses says that he thought the plaintiff jumped out to avoid an embankment, which the cart would pass after passing the excavation, but this view finds no support from the rest of the evidence. Holding then, as I do, that the excavation, in its unfenced condition, was a source of real danger to persons lawfully using the road, that but for the excavation the plaintiff would not have jumped from the cart, and that in so jumping the plaintiff only did what a person of ordinary nerve and presence of mind could reasonably be expected to do. I am of opinion that the defendants, who authorised the deep excavation and ought to have foreseen the danger, are liable for the resulting damages. The evidence as to the amount of damages sustained is very meagre, but upon the whole I am of opinion that judgment for £250 with costs in this Court and in the Court below would meet the justice of the case. The appeal must be allowed accordingly.

Mr. Justice Buchanan: In this case, which comes on appeal from the Circuit Court of East London, the plaintiff alleges that the defendants, the Municipal Council of East London, were repairing and constructing the St. Peter's-road, within the Municipality, and that in breach of their duty to carry on all operations on a road left open for traffic in a manner

consistent with the safety and protection of persons passing along the said road, they negligently and carelessly placed several casks of cement with a loose sail over them on one side of the road, and dug a deep hole or excavation, and placed a heap of stones near said hole on the other side of the road, the said excavation not being fenced off in any way, and the sail upon the casks of cement not being properly secured or fastened; that by reason of the said carelessness and negligent acts of the defendants, the plaintiff's horse, drawing in a cart, in which plaintiff was driving, was, on coming up to the said casks, suddenly frightened by reason of the said sail flapping, and swerved and ran away with the cart directly towards the excavation and stones, whereupon the plaintiff, to save himself from being precipitated into the said excavation, which he saw no chance of the cart escaping, jumped from the cart, and in doing so fell against the stones, and had his leg broken in two places, wherefore the plaintiff claimed £2,500 damages. The defendants pleaded to plaintiff's claim: first, a general denial; secondly, that they had entered into a contract for the work to be done to the road with one Ford, who was an independent contractor, and free from all control by the defendants, and that the acts and omissions complained of, if they were actually done and caused, were done and caused by the said Ford, independently of the defendants, and without any interference or control by the defendants; thirdly, contributory negligence, inasmuch as the plaintiff, without any necessity or just cause, jumped out of his cart on to the stones. Judgment was given for the defendants with costs. This third plea of contributory negligence appears not to have been relied upon in the Circuit Court, and is not supported by the evidence, nor is it discussed in the judgment of the presiding judge. As a fact, the cart was not precipitated into the excavation, but the opinion of plaintiff's brother-in-law, who was in the cart and jumped out, and escaped unhurt, as well as of a mason who was at work at the time on the works, was that if the men had not jumped out the cart and horse would have toppled over. Under the circumstances detailed in evidence I do not think blame can be held to attach to plaintiff for acting as he did. The learned Judge-President, in his reasons, states that the defences were: first, that the plaintiff was the unfortunate victim of a pure accident; and secondly, that if there was liability anywhere it was in Ford, who was an independent contractor. As I read his lordship's judgment, he finds for the Council on both of these defences, though he seems to rely more

on the second ground than on the first. It is clear, however, that the learned judge does not hold that the Council is protected simply because it has employed Ford to carry out the alteration in the street in question. His lordship states that although he did not take part in the judgment of the Eastern Districts Court in the case of *Murray v. East London Municipality* (9 E.D.C. Rep., 55), yet he concurs in the conclusion and reasons for that decision. That was a case of another accident at this same place during the carrying out of the work under the same contract, where a person who had at night walked into the excavation in question was awarded damages for injuries sustained. According to the head-note to that case the Eastern Districts Court laid it down that when a municipality contract for the execution of a work which necessarily involves danger, it is their duty to contract that the work shall be done in such a manner and under such conditions as to protect the public against the dangers necessarily involved; and failure so to contract makes the Municipality liable for damage caused by the absence of such precautions, even if the work be entrusted to a contractor under conditions which make him an independent contractor. I am prepared to adopt this statement of the law in so far as it applies to the case then under consideration, and as justifying the Eastern Districts Court in holding in that case that when a Municipality contracts for the repair of a street, and it is obvious from the nature of the work that they must have had in view the probabilities of excavations being made in the public street, and the contract does not bind the contractor to fence those excavations or light them up at night, the duties of fencing and lighting remain in the Municipality, and they are liable for damages caused by the absence of these. In the case now under appeal the learned Judge-President states that "the evidence proves that the excavation was a necessary consequence of the work committed to Ford, and that inasmuch as there was nothing in the contract providing for the protection of the public during the course of the construction of the new culvert which necessitated the construction of this excavation at the side of the road, I think defendants might perhaps have been liable in law if during the night time the injury had been caused in consequence of no proper indication by lights or otherwise of the presence of the excavation." But his lordship was of opinion that the unprotected excavation could not here be blamed. In his opinion the proximate cause of the injury was the act of Ford and his servants in placing the cement casks on the side of the road, and thus causing the plaintiff's horse to shy, and

that the temporary placing of these casks on the edge of the road was an act not contemplated by the contract with Ford, and, therefore, that there was no negligence in the Council in not providing against it. A great deal may fairly be said for the view that where an independent contractor is employed, the Municipality should be held answerable only for injuries caused by acts which reasonably can be considered as necessary or likely to be done in carrying out the works contracted for. Where I am inclined to differ from the learned Judge-President is in the view I take of the connection between the excavation and the injury suffered. I am inclined to look at the work being done for the Council on this particular road as a whole. The casks of cement and the stones were as necessary as was the excavation itself, and I cannot see my way to limiting the accident to the presence of the casks only. The immediate and proximate cause of the injury suffered by plaintiff was the stones, but I look on the casks, and especially upon the excavation, as contributing to the accident. But for the casks and flapping sail the horse might not have shied; but for the unprotected excavation the plaintiff would not have jumped, and but for the stones he would not probably have suffered the injuries complained of. Supposing that instead of jumping from his cart the plaintiff had sat still, and been precipitated into the excavation, as the witnesses say he would have been, the excavation would then undoubtedly have been the proximate cause of injury. There was a real danger caused by the unprotected excavation, and it was this danger that the plaintiff attempted to avoid by his jumping from the cart. According to the mason employed on the works, where the excavation touched the road, it was sheer nine feet down, and about nine to ten feet wide. The excavation at this depth ran up against and to the road, and there was nothing to protect it. This, it seems to me, should have been provided against by the Municipality, and their not having done so is convincing proof of negligence. If there is negligence from which injury results, the fact that the injury was caused not at night but at daytime, cannot relieve the Council from liability. For these reasons, in my opinion, the plaintiff is entitled to succeed in his action. As to damages, it would have been more satisfactory if they had been assessed by the Court of first instance. However, the evidence is before us upon which that Court would have had to found its verdict. Looking at the severe injuries suffered, and the pain caused and pecuniary loss entailed, I think that £250 would be a fair amount to award to plaintiff. The appeal should therefore, in my

opinion, be allowed, and judgment entered for plaintiff for £250 with costs, as well on appeal as in the Court below.

Mr. Justice Upington: I am also of opinion that the appeal should be allowed, and judgment entered for the plaintiff. The learned Judge-President, in laying down "that inasmuch as there was nothing in the contract providing for the protection of the public during the course of the construction of the new culvert, which necessitated the construction of this excavation at the side of the road," the defendants were thereby relieved from liability from accident in the day-time, appears to me to have given far too wide a construction to the legal exemption which has been held to apply in such cases. The common law and statutory liabilities of the defendants cannot be so lightly shaken off, and, in fact, the defendants seem to have held the same view when they made provision in the contract—as against the contractor—for damage arising from insufficient protection. On the question of negligence I am also clear. In my opinion the roadway was allowed to be kept in an improper state. When such an excavation was being made in a roadway which was not very broad, and having a fall, great care should have been taken to protect the public. Instead of so doing, no precaution was taken. Cement casks covered by a loose flapping sail were permitted to be placed close by the old wall, stones requisite for the building of the culvert were thrown down close to the excavation, and—*mirabile dictu*—the excavation itself was left wholly unfenced. The danger of leaving the excavation unprotected is clearly shown by the admission of Mr. Ford, the contractor, who says the stones were placed there for the "protection of traffic, to prevent its tumbling into the hole"; yet, according to Mr. Lloyd, the defendants' clerk of works, on the afternoon of August 1, he saw no stones on the east side of the culvert, and none opposite the culvert. Such were the circumstances which the plaintiff in his lawful uses of the roadway had to cope with. The result was that his horse shied at the flapping sail, and bolted in the direction of the excavation. If the roadway had been clear, the plaintiff would probably have escaped uninjured, but in jumping from the cart he came in contact with the loose stones, and was thereby thrown under the wheel of the vehicle. In my opinion, that was the direct consequence of the negligence of the defendants. As to contributory negligence, I think there was none. The plaintiff was in imminent peril when he jumped. The right wheel was not only within four inches of the mouth

of the excavation, but it actually threw back into the excavation some of the excavated clay which had been thrown up, while the left wheel coming in contact with one of the stones, tilted the vehicle up so dangerously that if there had been an occupant of the vehicle all would have been precipitated into the excavation made by the defendants. Under these circumstances, I think the plaintiff reasonably obeyed a natural impulse to preserve his life, and, therefore, he cannot be said to have been guilty of contributory negligence.

[Appellant's Attorneys, Messrs. J. & H. Reid & Nephew; Respondents' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

IN THE ESTATE OF NICOLAAS { 1895.
ALBERTUS JANSEN VAN VUUREN. { Feb. 12th.

Mr. Molteno applied for the appointment as provisional trustee of William Ernest Davis.

Mr. Graham opposed, and applied for confirmation of the election of F. W. Naser.

The Chief Justice said: It does not appear to me to be quite hopeless to expect that there will be another election in case the Court orders it, because the two candidates were equal as far as numbers were concerned, but one had the majority in value. The Court will therefore order a fresh election and in the meantime appoints both Mr. Naser and Mr. Davis as provisional trustees, with power, in case there should be again a failure to elect a trustee, to administer and liquidate the estate. Costs of this application to come out of the estate.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

REGINA V. BLAUWVEROI. { 1895.
 { Feb. 18th.

Magistrate's jurisdiction—Theft—Conviction on separate indictments.

Where a prisoner was charged on two indictments with the theft of different articles, found guilty, and sentenced to separate terms of imprisonment on each indictment, The Court, on review, quashed the conviction on the second indictment.

The Chief Justice referred to this case which had come before him on review from the Resident Magistrate of Carnarvon.

The accused was charged on two indictments with the crime of theft.

The first charged him with stealing two ribs, portion of the slaughtered carcass of a sheep, the property or in the lawful possession of Samuel Malgas. The second charged him with stealing a gun, powder, a pair of trousers, &c., &c.

The prisoner was found guilty on each indictment, and sentenced to separate terms of imprisonment.

The Chief Justice, after stating the facts, said: The prisoner should have been charged on one summons only, otherwise the prisoner might have been charged with the theft of each article and convicted, and so the jurisdiction of the Magistrate be indefinitely extended.

The conviction on the second summons will be quashed, that on the first will be confirmed.

In re "ERNESTINE." { 1895.
 { Feb. 13th.

General average—Bill of lading—York and Antwerp Rules—Sale of cargo—Interdict.

Interdict granted to restrain the master of a ship from selling part of the cargo for the purpose of paying expenses of repairs in a port not being a port of refuge; there being no prima-facie ground for holding that the damage to the ship, which was occasioned by the leakage of sulphuric acid improperly conveyed, to the knowledge of the master, in iron drums, constituted a loss for which contribution must be made by the owners of the rest of the cargo who, under their bills of lading, had agreed to be bound by the York and Antwerp Rules of 1890.

This was an application (by certain consignees) for an interdict restraining the sale of certain cargo on board the German barque Ernestine, lying in the Docks at Cape Town, and insured in the Marine Insurance Company, London, and in other companies.

The facts (as deposed to by the applicants) are briefly these: The Ernestine sailed from Hamburg for South African ports about July, 1894, and reached Table Bay early in October last. Upon discharging her Cape Town cargo, it was discovered that the vessel had sustained damage by reason of the leakage of some sulphuric acid

which had been stowed between decks in iron drums. In order to complete her voyage and earn her freight, the captain of the *Ernestine*, acting on behalf of the owners of the vessel, had certain repairs effected to her, and incurred various other expenses, for the payment of which (notice having been given to the owners and consignees) he advertised for an advance of money on bottomry of the ship and her freight, but without success.

Thereafter he obtained a certificate from the Imperial German Consul of Cape Town, authorising the captain to hypothecate the cargo and obtain money on bottomry of the ship, freight, and cargo.

Upon being informed of the issue of this certificate, and upon observing the advertisements calling for tenders on bottomry, the petitioners protested against their cargo being hypothecated for the benefit of the ship and freight.

The captain having failed to obtain bottomry, advertised an intended sale of part of the cargo for Thursday, the 14th inst. Against this step the petitioners protested.

They alleged that the value of the ship was not more than £3,500, whereas the cargo (exclusive of the Cape Town cargo) was valued at least at £8,000, and that the freight still payable was £383 14s. 3d.

That should the proposed sale take place, the petitioners feared that their cargo would be sold at less than its real value, and that owing to the liabilities already incurred by the captain on behalf of the owners, the vessel, if attached and sold, would not fetch a sum sufficient to recoup them for losses, cost, and expenses.

The petitioners further alleged that they were prepared and had tendered to accept delivery of their cargo here upon payment of distance freight, subject to their rights against the vessel for detention and other damages.

The captain and agents of the vessel claimed that the cargo was liable to contribute to the expenses of repairing the vessel by way of general or particular average or otherwise, whereas the petitioners denied any such liability.

The prayer was for an interdict restraining the captain from selling the cargo, or, should it seem fit, to grant the petitioners an order compelling the captain to make delivery of the cargo here upon payment of distance freight.

There was evidence to show that when the sulphuric acid was shipped at Hamburg the captain raised objections to receiving it on the grounds that there would be considerable risk in placing the acid below deck. The charterers' agents thereupon produced a number of manifests of cargo of other vessels

showing that in those cases sulphuric acid shipped in casks of a similar construction had been stowed below deck. They explained that the nature and construction of these casks were such that it was safe stowage to put them below deck, and they insisted moreover that the ship was bound to take these casks in the place where they wished them to be stowed, as they were not asking more than was in accordance with the Police Regulations, and that therefore the terms of the charter party bound the ship to take them below deck.

The acid was accordingly shipped and the rate of insurance upon the ship was altered, and a higher premium paid on account of the possible risks to her from carrying the acid.

It was stipulated in the bills of lading that general average, if any, was to be regulated and paid according to the York and Antwerp Rules of 1890.

Rule 10 is as follows:

(a) *When a ship shall have entered a port or place of refuge or shall have returned to her port or place of loading in consequence of accident, sacrifice, or other extraordinary circumstances, which render that necessary for the common safety, the expenses of entering such port or place shall be admitted as general average, and when she shall have sailed thence with her original cargo, or a part of it, the corresponding expenses of leaving such port or place, consequent upon such entry or return, shall likewise be admitted as general average.*

(b) *The cost of discharging cargo from a ship, whether at a port or place of loading, call or refuge, shall be admitted as general average, when the discharge was necessary for the common safety, or to enable damage to the ship, caused by sacrifice or accident during the voyage, to be repaired, if the repairs were necessary for the safe prosecution of the voyage.*

(c.) *Whenever the cost of discharging cargo from a ship is admissible as general average, the cost of reloading and stowing such cargo on board the said ship, together with all storage charges on such cargo, shall likewise be so admitted, but when the ship is condemned or does not proceed on her original voyage no storage expenses incurred after the date of condemnation, or of the abandonment of the voyage, shall be admitted as general average.*

Mr. Rose-Innes Q.C. (with him Mr. Benjamin), in support of the application: Under certain circumstances the master of a ship may hypothecate the cargo, but he can only do this as the agent of the owners of the cargo (*MacLachlan*, pp. 154-5), and when he is driven to it for the benefit of the cargo. *In re Avanti Savoia* (2

Sheil, 330; 9 Jura 442). And whenever possible he must first notify his intention to the owners of the cargo (*Mauds and Pollock*, Vol. I., pp. 564-9). If he does not do that then the hypothecation is void even as against the person who *bona fide* lent the money. *Re "Formica"* (2 Jura, 197). It is essential to give notice to the cargo owners in order that they may instruct the master, who is acting as their agent, what to do. They may instruct him to land the cargo or may advance money themselves (*Kay*, Vol. I., p. 564). In the present case they have given him instructions—they have told him to land the cargo here. (See correspondence.) By English law full freight would be payable (*Kay*, Vol. I., p. 298), but in the present case the law of the flag governs. *Gastano and Maria* (7 P.D., 137), and by that law distance freight is all that could be claimed. See *Lewndes*, p. 423. The position taken up by the master is that the cargo is liable for the *pro rata* share of expenses incurred, and he will not deliver the cargo unless that liability is acknowledged. The expenditure was necessitated by the damage sustained by the ship, not by the cargo (See surveyor's report). The cargo does not appear to have been damaged very much, and the damage to the ship was caused by stowing the acid below deck. To see the folly of such procedure one need only read Dr. Marloth's report.* The damage to the ship was not caused by perils of the sea (*Arnould*, Vol. II., p. 742.) The protest says that there was heavy weather, but that could not account for the great escape of acid. As soon as there was a little leakage the drums became corroded from the outside. This was the fault of stowage and was therefore not a general average loss. It was not a sacrifice for the preservation of the entire venture. Even if the leakage had been caused by a peril of the sea the cargo would not have to contribute to repairs unless the loss was a general average loss. Every repair necessitated by a peril of the sea is not necessarily a general average loss (*Arnould*, Vol. II., pp. 839-841) and if not a general average loss how can the cargo be called upon to contribute? Something is tried to be made out of the fact that the captain was ordered by the charterers to place the acid below the deck, but we have nothing to do with the charterers. It is sometimes a nice point to decide whether a master signs for charterer or for owner. It all depends upon the charter-party and knowledge of the shipper. (*Scrutton*

* Dr. Marloth in his report expressed surprise that the vessel had ever reached its destination, so great in his opinion was the risk that had been incurred in stowing iron drums of sulphuric acid below deck without being properly packed in chalk. REP

(p. 266); *Sandeman v. Scurr*. L.R. (2 Q.B., 86); (*Alston v. Herring*, 11 Exch., p. 822).

It is submitted that under the circumstances in this case the master cannot sell the cargo and that the applicants are entitled to the interdict prayed for.

Mr. Searle, Q.C., for the master: In this case the law of the flag prevails, and under German law the owners of the cargo are liable to contribute. See *Pritchard's Admiralty Digest* (Vol. I. 159-165 and 504-509). The "*August*" (L.R.P.D. (1891), p. 328).

The applicants received due notice and were made fully acquainted with state of the vessel and of the expenses which were being incurred. He cited *Hall and Another v. Janson* (24 L.J.Q.B., N.S. 97); *Simonds and Loder v. White* (2 B. & C., 805); *Lewndes* (397-406 and 624); *MacLachlan* (p. 712).

The Chief Justice referred to the York and Antwerp Rules of 1890, which were incorporated in the bills of lading.

Mr. Rose-Innes, Q.C., in reply: These rules are founded on the general principles of the law of average. But the owners of cargo cannot be held liable to contribute to a loss caused by the negligence of the charterers or of the Master.

The Court granted the application.

The Chief Justice said: It is common cause that during the voyage of the German barque *Ernestine* from Hamburg to the Cape considerable damage was done to the ship by the leakage of sulphuric acid from iron drums which had been stowed beneath the deck. That, however, was not the cause of her coming into Table Bay, for part of her cargo was consigned to Cape Town and the damage was not discovered until after the Cape Town cargo had been removed. It was then found that the leakage had penetrated to and damaged the ship's timbers and that it was necessary to discharge the rest of the cargo in order to effect the required repairs. Notice of everything that was done by the master was given to the applicants, who are owners of the cargo consigned to Port Elizabeth, but nothing was said as to holding them liable for any part of the expenses of landing and reshipping the cargo or repairing the ship. Attempts were made by the master to obtain the money for paying those expenses on bottomry of ship and cargo, but he failed, mainly because of the objections raised by the applicants. The master then obtained the consent of the German Consul to a sale of portion of the applicants' cargo for the purpose of defraying such expenses as should remain unpaid after money had been raised on bottomry of ship and freight. The

object of the present application is to prevent such sale and the question to be determined is whether the expenses incurred in Cape Town constitute a loss for which contribution by general average must be made. There can be no doubt that, if the ship had been British and, the applicants' bills of lading had contained no stipulation to the contrary, no contribution could have been claimed from them. But the *Ernestine* is a German ship and the parties to the bills of lading agreed to be bound by the York and Antwerp Rules of 1890, and we must therefore proceed to consider whether under those rules general average is claimable. The only rules which can in any way apply to the present case are those numbered 2-10. (His lordship after reading the rules continued.) Now it appears to me that none of these rules are applicable. The *Ernestine* did not come into Table Bay as a place of refuge nor did she return to the Bay as the port of loading. After part of the cargo had been discharged the damage was discovered and it is by no means clear that the vessel could not have gone on to Algoa Bay without first executing repairs in Table Bay. Then again the question arises whether the damage was caused by an accident during the voyage. There was a leakage from iron drums, which ought not to have been received on board without the necessary precautions against damage, and the damage caused by such leakage cannot be considered as a loss for which the innocent owners of the rest of the cargo are to be called upon for contribution. The objection to the owners of the ship being entitled to general average becomes still greater when it is borne in mind that danger was foreseen from the sulphuric acid, and that additional insurance was paid by reason of sulphuric acid being taken in iron drums on board.

The owners of the Port Elizabeth cargo ought not in principle to suffer for the negligence of the master, and I do not find anything in the York and Antwerp Rules of 1890 which, under circumstances like the present, imposes a liability on them for general average. As the master may still desire the question to be determined by action I wish to say no more at present. It is sufficient for the purpose of the motion now before the Court to say that no *prima-facie* ground exists for holding that the applicants are liable to a general average contribution, and their application to restrain the sale of the cargo must therefore be granted with costs. Their lordships concurred.

[Applicants' Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

VAN DER WESTHUIZEN V. COHEN { 1895.
BROTHERS. } Feb. 13th.

Magistrate's Court—Summons—Exception—
Damages.

Where, in a summons in a Magistrate's Court for damages for the wrongful taking and selling of the plaintiff's goods, it sufficiently appears that the amount claimed is intended to represent the value of the goods, it is no ground of exception that the summons ought to have claimed delivery of the goods with an alternative claim for damages.

This was an appeal from a decision of the Resident Magistrate of Hay, in an action in which the present appellant (plaintiff in the Court below) sued Herman Cohen and Jacob Cohen, trading as Cohen Bros., for £15 damages.

The summons alleged that Herman Cohen and one Moritz Cohen, acting on behalf of Cohen Bros., on or about the 13th November, 1894, removed from the farm Rietfontein, the property of one Hendrik van der Westhuizen, certain head of cattle.

That amongst the said head of cattle were four heifers, the property of the plaintiff, which heifers were unlawfully taken possession of by the said Cohen Bros.

That Nicholas van der Westhuizen, acting on the plaintiff's behalf, claimed from the said Cohen Bros. the said four heifers on or about the 28th November, but the heifers were not restored to their rightful owner, the plaintiff, by the said Cohen Bros.

That the said Cohen Bros. subsequently, on the 28th November, sold the said four heifers by public auction by their auctioneer, George Gie.

That the plaintiff hath been unlawfully deprived of his four heifers by the said Cohen Bros., and is presently out of possession of his rightful property, and hath suffered damage to the extent of £15, which sum the said Cohen Bros. refuse and neglect to pay.

Wherefore the plaintiff prays that they may be adjudged to pay the same, with the costs of this suit.

The defendants excepted to the summons on the grounds that the same was vague, embarrassing, and bad in law, as they are unable to ascertain therefrom whether they are summoned in an action for damages for trespass on H. P. van der Westhuizen's farm, for unlawful seizure, or for unlawful possession of the cattle, as the circumstances and acts of unlawfulness are not alleged, nor is it even alleged that the cattle were taken or removed without con-

sent and permission of the plaintiff (if his property), and, therefore, no ground of action is disclosed.

Further, if the cattle, as alleged, are owned by plaintiff the action is wrongly instituted, and the plaint ought to be for delivery of the cattle, and an alternative claim for damages. Act 20 of 1856, schedule C; *Ackerman v. Adams* (1 Jut., 17); *Van der Linden*, pp. 50 and 100.

The Magistrate upheld the exceptions with costs.

The plaintiff now appealed.

Mr. Graham was heard in support of the appeal.

Mr. Rose-Innes, Q.C., for the respondents.

The appeal was allowed.

The Chief Justice said: The question is whether the summons in the Court below gave a sufficient indication to the defendants of the real nature of the remedy which the plaintiff sought by his action. In my opinion the defendants had sufficient notice of the case which they had to meet. After stating that certain four heifers, the property of the plaintiff, had been taken possession of and sold by the defendants, and that the plaintiff had suffered damage to the extent of £15, the summons claims that amount. The first exception to the summons was that it is embarrassing in not disclosing the ground of action, but this exception was not much pressed in this Court. The chief objection is that "if the cattle, as alleged, are owned by the plaintiff the action is wrongly instituted, and the plaint ought to be for delivery of the cattle and an alternative claim for damages." But the summons alleges that the cattle had been sold and therefore a claim for delivery of the cattle would have been nugatory. The claim for damages can only be based upon the value of the heifers, and although the summons does not say in distinct words, it is a fair inference from the summons, taken as a whole, that the amount claimed as damages is intended to represent the value of the heifers. Whether the plaintiff succeeds or fails in the present action—and this is a fair test of the validity of the objection—he could not again sue the defendant for the value of the heifers. It is far better that, upon exceptions of this nature, an amendment should be allowed in the Magistrate's Court if no prejudice can be done to the defendant by such a course. The case must be remitted to the Magistrate's Court to be tried on its merits, when he will still have an opportunity of allowing an amendment of the summons so as to remove any possible doubt as to the nature of the claim. The appeal must be allowed with costs.

Their lordships concurred.

[Appellant's Attorney, G. Montgomery-Walker; Respondents' Attorney, Gus Trollip.]

Re MEIRING'S ESTATE. } 1895.
Feb. 13th.

This was an application under Act 17 of 1886, section 11, to stay a writ of execution, pending the surrender of an estate as insolvent.

The insolvent gave notice on 29th January that his estate would be surrendered on 15th February.

Some of his creditors levied execution, and the sale was fixed for twelve o'clock to-day (13th February).

Mr. Molteno was heard in support of the application.

The order was granted as prayed.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS (Chief Justice),
Mr. Justice BUCHANAN, and Mr. Justice
UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

PRINCE, VINTOENT AND CO. V. } 1895.
LANDAU. } Feb. 14th.

Mr. Tredgold moved for the discharge of the provisional order of sequestration.

Granted.

ANDERSON'S EXECUTORS V. WELGEMOED.

Mr. Buchanan applied for provisional sentence for the sum of £1,600 on two mortgage bonds, with interest.

Granted.

ABELSOHN'S TRUSTEE V. VAN DER WESTHUIZEN.

Mr. Shippard moved for provisional sentence for the sum of £50, with interest from October last.

Granted.

COETSEE V. ERLANK.

Mr. Shippard moved for provisional sentence for the sum of £90, with interest from April, 1894, due on a promissory note.

Granted.

THE MASTER V. MCDONALD'S EXECUTORS.

Mr. Giddy applied for an order compelling the defendants to file accounts.

Order granted.

FRASER V. CUNNINGHAM.

Mr. Webber applied for provisional sentence on two promissory notes for £50 and £125 respectively, with interest.

Granted.

MARAI V. BINDER.

Mr. Maskew applied for provisional sentence for the sum of £45, with interest, being an amount overpaid.

Granted.

ADMISSIONS.*Ex parte* **BORCHERDS.**

Mr. Watermeyer applied for the admission of Mr. James William Borchers as an attorney and notary of the Supreme Court.

Mr. Borchers took the oath, and was duly admitted.

Ex parte **RUSSELL.**

Mr. Buchanan applied for the admission of Mr. Ernest Gordon Russell as circuit attorney.

The order was granted, the oaths to be taken before the Resident Magistrate of Maclear.

GENERAL MOTIONS.

COOK BROS. V. COLONIAL GOVERN- { 1895.
MENT. { Feb. 14th.

Trial—Application for postponement refused. Where in an action against the Colonial Government the declaration had been filed on the 12th November, the pleadings closed on the 6th December, and the case set down for trial on the 28th February.

The Court, on the application of the defendant, refused to order a postponement until the May Term.

This was an application on notice to the respondents (plaintiffs in the action) that they would be required to show cause why the trial of the case, which has been set down for the 28th instant, should not be postponed till next term.

The affidavit on which the application was founded alleged *inter alia* that certain evidence

from Pondoland would be necessary for the defence; that active steps were being taken to collect this evidence, but that much research, great care, and further time would be required before the case could be fully placed before the Court: and that it would be impossible for the defendant to go to trial this term.

That amongst other things evidence would be required as to the circumstances attending the execution of the documents sued upon, and as to native law and custom, and a number of persons would have to be interviewed before the necessary evidence could be collected for the information of the Court.

That the defendant did not desire in any way to prevent the hearing of the case at the earliest possible date, but that in view of the great importance of the issues involved concerning, as they do, the large territory of Pondoland, he considered that there should be ample time allowed for the preparation of the defence.

The affidavit of one of the respondents' attorney, set forth that the declaration was filed on November 12 last, that the pleadings were closed on the 6th December, and that in order to facilitate matters, application was made on the 12th December for the appointment of a commission to examine witness, which was opposed by the defendant and refused by the Court.

That Mr. McIntyre, one of the attorneys for the plaintiffs, had visited Pondoland and elsewhere for the purpose of ascertaining the whereabouts of the witnesses, whose attendance will be required in the Supreme Court in support of the plaintiffs' case.

That these witnesses are of many and diverse nationalities, languages, and positions in society, and include amongst their number the civilised and uncivilised, educated Europeans and uneducated natives, and are widely scattered about, some in Pondoland, some in Kokstad, some in East London, and others in Griqualand East and other places in the vicinity of the above. That it was, therefore, manifestly of vast importance to the plaintiffs that the trial of the case should take place with as little delay as possible in order to avoid the very great risk and probability of very valuable and material evidence, now available, being entirely lost to the plaintiffs should the trial be long delayed.

The deponent alleged that he was informed, and believed the information to be true, that a spirit of unrest is manifesting itself amongst the natives of Pondoland, and is likely to lead to disturbances, and that the Government have in consequence moved troops in that direction, and that in the event of such disturbances tak-

ing place. It would in all probability be impossible to obtain the evidence of many witnesses for the plaintiffs which is now obtainable.

The deponent lastly said that the defendant Government was made acquainted with the nature, extent, and grounds of the plaintiffs' claims more than twelve months ago.

In reply to the above an affidavit was filed by Mr. J. Rose-Innes, sen., denying the statements that a spirit of unrest was manifesting itself amongst the natives of Pondoland, and that the Government had in consequence moved troops in that direction.

Mr. Schreiner, Q.C., A.G., Mr. Juta, Q.C., and Mr. Giddy appeared for the applicants.

Mr. Sheil and Mr. Webber for the respondents.

The Court refused the application and fixed the 6th March for the trial. Costs to be costs in the cause.

Mr. Justice Buchanan and Mr. Justice Upington both expressed their disapproval of the statement made on behalf of the respondents, that a spirit of unrest existed among the natives in Pondoland, a statement which the learned judges characterised as being without foundation, and mischievous.

[Applicants' Attorneys, Messrs. J. & H. Reid & Nephew; Respondents' Attorneys, Messrs. Tredgold & Co.]

IN THE MATTER OF THE MINOR KATHLEEN JENNER.

Mr. Watermeyer moved for authority to the Master to pay out to the father of the said minor from money to her credit in the Guardians' Fund a quarterly allowance to provide for her education.

Order granted in the terms of the Master's report.

IN THE MATTER OF THE MINOR MARIA HUGO.

Mr. Shippard applied for authority to the Board of Executors, as administrators of funds accruing to the minor out of the estate of her grandparents, to pay out a sufficient sum to enable her to proceed to the South African Republic for the benefit of her health under medical advice.

Order granted in terms of the Master's report.

BRYTENBACH V. SMUTS'S EXECUTORS AND OTHERS.

Mr. Sheil moved for leave to the defendant executor to sign judgment against the plaintiff in the suit instituted by him (for a declaration

of the nullity of a will) by reason of his failure to proceed with the action within the time prescribed by the rules of the Court.

The Court granted the order as prayed.

ATMORE V. CHADDOCK.

Mr. Innes, Q.C., moved for the appointment of Mr. Tredgold as *curator ad litem* to represent the minor Sarah C. E. Atmore, a child of the defendant by her former husband, Edward Atmore, in an action in respect of the estate of the said Edward Atmore.

Order granted, with power to intervene as co-defendant. Costs to be costs in the cause.

Order granted, expenses to be borne by the applicants.

Re CLARK'S ESTATE. { 1895. Feb. 14th.

Minors' portions — Intestacy — Widow — Security.

Where it was clearly for the benefit of minors that the estate of their father, who had died intestate, and who had been married in community, should not be immediately realised to pay their portions, the Court allowed their mother to remain in possession of the estate, she undertaking to find security for payment of the minors' shares, and to educate and maintain them at her own expense.

Mr. Sheil applied for authority to the executor dative to allow the assets of the said estate, consisting of farms and stock in Griqualand East, to remain in possession of the surviving widow to be worked for the benefit of herself and the minor children, on condition that she shall give security to the satisfaction of the Chief Magistrate for the due payment of the minor's portions.

The facts are briefly these:

John Clark died on 29th June, 1893: intestate. He left landed property, stock, &c., in Umzimkulu district, Griqualand East. There were seven major children of the marriage and three minors; and this was an application by the executor dative of the estate, and by the widow (married in Natal in community of property) and by the major children, praying that the executor might be allowed not to realise the estate to pay out the claims of the widow and heirs, on the ground that a forced sale would under the circumstances mean a serious loss, but that if the estate were kept intact it would steadily increase in value. The major children agreed to make over to the surviving spouse for life

their shares of the estate so far as they were concerned. The surviving spouse also undertook to provide proper security for payment (at any time fixed by the Court) of the minors' shares; and to educate and maintain the minors at her own cost.

The Chief Magistrate, Griqualand East, having certified that this course would be advantageous to the minors and the estate generally,

The Court ordered in terms of the Chief Magistrate's report.

[Petitioners' Attorneys, Messrs. Van Zyl & Buissinné.]

IN THE INSOLVENT ESTATE OF } 1895.
THOMAS C. SLABBER. } Feb. 14th.

Mr. Tredgold moved for authority to the Master of the Supreme Court to call a meeting of creditors for the election of a new trustee in place of the late James H. Steer, originally elected, for the said estate, in case the Court should be of opinion that the estate should be represented in certain action instituted by the said Slabber for the recovery of an amount claimed from the estate of his wife's deceased father.

Order granted.

STEENKAMP'S EXECUTRIX V. WIESE. } 1895.
 } Feb. 14th.

Waiver of rights—Marriage in community—
Sale of property—Consent in ignorance of
rights—Trespass—Damages.

Where a woman by virtue of her marriage in community had become entitled to a half-share in certain landed property, and without being fully acquainted with her rights consented to a sale of the property by her children, who were entitled to the other half,

Held that, there had been no waiver of her rights, and that she was entitled to succeed in an action for trespass and damages against the purchaser, who was in occupation of the land.

This was an action of ejectment and damages instituted by Hendrika Christina Steenkamp, in her capacity as the executrix dative of the estate of the late Johannes Benjamin Steenkamp, against the defendant, Andries Tobias Wiese.

The declaration alleged that the plaintiff, who is at present married to one Snyman, and is

duly assisted by him in this action, is the executrix dative of the late Johannes Benjamin Steenkamp, to whom she was during his life-time married in community of property; that the defendant is a farmer residing at Vlakkraal, in the district of Victoria West.

That in or about the month of September, 1837, one Lucas Petrus Steenkamp, senior, hereinafter called the testator, and his wife, Isabella Aletta Steenkamp, hereinafter called the testatrix, to whom he was married in community of property, executed a joint will by which each of the spouses appointed the survivor, together with the children of the marriage, to be his or her heirs, and in or about the month of March, 1848, the testators duly executed a codicil to their will, in terms of which they bequeathed their farm Abuispoort, situated in the district of Victoria West, to their two sons, Johannes Benjamin Steenkamp and Lucas Petrus Steenkamp, for the bequest price of 20,000 guilders, Cape value. The testator died in the year 1858, without having revoked or altered the said will and codicil, and the testatrix adiated under the said will and codicil, and remained in possession of the said farm and thereafter entered into a second marriage with one De Villiers.

Upon the adiation by the executrix the said Johannes Benjamin Steenkamp acquired a vested right to half of the said farm upon payment of 10,000 guilders, being his *pro rata* share of the bequest price, but subject always to a life usufruct in favour of the testrix.

The said Johannes Benjamin Steenkamp married the plaintiff in or about the year 1871, and there were born as issue of the said marriage one son named Lucas Petrus Steenkamp, and one daughter (now married in community to one J. B. van der Westhuysen). Both are still living and are majors.

In the year 1886 the plaintiff's husband, Johannes Benjamin Steenkamp, died intestate, and the plaintiff was thereafter duly appointed executrix dative of his estate, and received letters of administration accordingly. The plaintiff thereafter entered into a second marriage with one Snyman, and is duly assisted by him in this action as far as need be.

The testatrix, the said Isabella Aletta Steenkamp (afterwards De Villiers), died during the year 1893.

The plaintiff is desirous of taking possession of the half share of the farm Abuispoort, and of dealing with and distributing it according to law. She has paid to the executor dative of the estate of the testator and testatrix the sum of 10,000 guilders, being £250, and on the 9th

November, 1894, the said executor transferred to her, as executrix of her late husband, the half-share of the farm aforesaid.

The defendant is in occupation and possession of the said half-share, and wrongfully and unlawfully refuses to give up possession thereof to the plaintiff, and wrongfully claims that he is entitled to the ownership by virtue of certain agreements which he alleges that he entered into with the children of the said Johannes Benjamin Steenkamp.

The plaintiff claimed :

(a) An order that she, in her capacity as executrix, is entitled to realise the said farm, and to distribute the proceeds between herself and the heirs *ab intestato* of her husband according to law.

(b) An order compelling the defendant forthwith to quit and deliver up the possession of the said farm to her.

(c) Payment of the sum of £500 as damages by reason of the defendant's unlawful occupation of the said farm.

(d) Further relief and costs.

The defendant specially pleaded that :

Prior to the month of March, 1888, the plaintiff's son, Lucas Petrus Steenkamp, and son-in-law, Johannes Benjamin van der Westhuysen, with the knowledge and consent of his wife, offered to sell to the defendant the said half-share of the said farm which had been partitioned by the said testatrix, A. de Villiers, and half which farm she had transferred to her son, Lucas Petrus Steenkamp.

The defendant communicated the said offer and the price, which was more than the value of the full said half of the farm, to the plaintiff and her husband, the said Snyman, to whom she was then married, and the said plaintiff and her husband then represented to the defendant that she and her husband had waived and surrendered any rights they might have in the said half-share in favour of the said children of the plaintiff, and that the said son and son-in-law were entitled to the whole of the said half-share, and were entitled to sell it to the plaintiff, and relying upon and induced by the said representations, and with the full knowledge and consent of the plaintiff and her husband, the defendant, on the 1st March, 1888, bought the said half-share in the said farm from the said son and son-in-law, who sold it to the defendant.

Thereafter the defendant paid the price agreed upon to the said son and son-in-law to the knowledge of the plaintiff and her husband, and by means thereof they purchased a farm, of which the plaintiff and her husband have had the use, occupation, and enjoyment.

Upon the death of the said testatrix, A. de Villiers, the defendant took possession and occupation, as he was legally entitled to do, of the said half-share to the knowledge of the plaintiff, her husband, and the said son and son-in-law, and without any let or hindrance, and remained in possession of the said half-share without let or hindrance until the present action.

Wherefore the defendant prays that the plaintiff's claim may be dismissed with costs.

The replication joined issue.

Mr. Rose-Innes, Q.C., and Mr. Graham for the plaintiff.

Mr. Juta, Q.C., and Mr. Webber for the defendant.

Mrs. Hendrika Christina Snyman said her former husband was Johannes Benjamin Steenkamp. She resided in the Carnarvon district. Was married to her former husband in community of property. In 1887 and 1888 she was living at Hout Kop. In 1888 she had no knowledge that she was to receive anything under the will of the old Steenkamps. She had two children by her first husband and five by the second. The "koop brief" was signed on the 1st March, 1888 ; as to an agreement of her son, Lucas Steenkamp, and son-in-law, Van der Westhuysen, to sell part of the farm, Krants Vogelvley, to Wiese for the sum of £1,500, witness remembered in the beginning of 1888 Wiese coming to the farm with the two young men. Wiese said he had bought the ground from them for £1,500, of which he would pay down £500 and the other £1,000 after Mrs. De Villiers's death. Witness expressed her disapproval because the children thus sold their farm in the old people's lifetime. She told Wiese he had betrayed her children, and that the end of the matter would be a law suit. Wiese said he would not interfere with the old lady, and that at her death the children would come into the property. Her husband was present at the interview. Witness never saw a "koop brief." The £500 was paid by Wiese in February, 1889, to the two boys. Witness never received any portion of the money. They did buy a farm with it (Sandpan), which witness used with her husband, but only for nine months. They paid rent for its use—the sum of £15. Beyond that they received nothing. Never told Wiese that she and her husband had given up all their rights in the farm and that the children could have them all. There was a lawsuit in February, 1893. Before the end of 1892 she had no idea that she had an interest in Abuyspoort at all. Never saw her mother-in-law's will till her death. In consequence of what her husband told her she

caused inquiries to be made through Mr. Cornelius, and as a result she paid half the bequest price (£250) into the estate of old Mrs. Steenkamp, and had taken transfer; and her desire was to sell the place at public auction and to deal with the proceeds as executrix. The half-share she valued at £3,000.

Cross-examined by Mr. Juts: In 1886 the farm Abuyspoort was divided into two parts. Her son and son-in-law went there, and Wiese was present. Peter Wiese was her brother-in-law. She told them to take Peter Wiese with them to see that the division was properly effected. She always thought the ground belonged to her son and son-in-law. Did not know she had any right to it then. She was then living at Goedkop with her husband, Snyman. Knew Wiese was buying the ground belonging to the two children, but was against it. The uncle got £2,000 for the half, and Wiese only wanted to give £1,500 for the remaining two quarters of the children. In February, 1888, Wiese lived ten hours from witness. Did not know if the two boys went to Wiese to offer to sell, but her son said Wiese wanted to buy the ground. Witness's husband (Snyman) was at that time insolvent. Became insolvent after she married him, and they were at the time in poor circumstances. The two boys wanted to buy Sandpan, but witness was not anxious for it as she and her husband had a home already. However, as soon as Sandpan was bought witness went with her husband to live there. Did not know there was a mortgage of £500 on Sandpan and that Wiese's £500 was to pay this off. She filed an account in her husband Steenkamp's estate. She was very careless at the time. In that account she said that on the death of Mrs. De Villiers her husband would be entitled to half the property. Could not say anything about it as she was very careless.

Mr. Innes said that if Wiese's contract was right he would have a quarter share. The witness's right came in by virtue of her marriage in community with Steenkamp.

The Chief Justice said that it was evident from the account that she knew her husband would be entitled to half the property.

Cross-examination continued: Wiese came to her and her husband and had a conversation about the sale. Did not come to ask their consent to the sale. It was before the "koop brief" was made out. Did not think Wiese journeyed for ten hours to come to them about it. Had no recollection of saying anything to Wiese about her sons wanting to buy Sandpan. Knew nothing about the second agreement that was drawn up, but heard that in October, 1892,

Mrs. De Villiers sold some property to one Ras Leenberg. A messenger from Wiese first told witness of that. Knew that her sons would have to pay the £500 back to Wiese if they could not give Wiese the ground.

The account signed by witness in her husband Steenkamp's estate was here produced. Witness did not remember who brought the account to her for signature, but her agent was old Horak since dead. He did not explain the account to her, and she did not know what she was signing. He might have stated that after the death of witness's mother-in-law half the farm would belong to her husband Steenkamp and that her son would be entitled to a quarter, but she did not know anything about it. Did not know in whose handwriting it was.

Mr. Juts handed in the account in the insolvent estate of witness's husband Steenkamp, showing a deficiency of over £3,000.

Re-examined by Mr. Innes: At her first husband's death she was twenty-three years old. Lived at Beyersfontien.

Mr. Innes said it was significant that whoever sent her the account to sign had written in pencil where she was to sign.

Witness continued that she could not read English. The account was written in English. In 1888 she did not know she was entitled to any property in consequence of the marriage in community with her husband. When Wiese called on her he was on his way to another place about the "koop brief."

Lucas Petrus Steenkamp, son of the plaintiff, deposed that he was one of those who signed the "koop brief." Shortly before it was signed there was a drought, and he trekked with his sheep to Mr. Wiese's farm. They first came to talk about the sale through Wiese asking witness if he would sell his place. Subsequently, his brother-in-law came and Wiese offered £1,500 for both their rights. Wiese told them that half of Abuyspoort belonged to witness and his brother-in-law. It was decided to write out a "koop brief," but it was not done on the spot as it was arranged to meet at Kaalplats. At Kaalplats, however, it was not done as there was no "scholar" there to do it. His mother did not like the sale, and it was afterwards decided to go to Smuts, the schoolmaster, at Kleinbeyersfontein. On the way to the latter they had to pass his mother's place. His uncle, Van der Westhuizen, was with them. Witness was there when the conversation about the sale took place between Wiese and witness's mother. His mother expressed great dissatisfaction with the sale, and said it would end in litigation. They, however, went to Kleinbeyersfontein on the same day (1st March, 1888), and the "koop

brief" was signed. Witness went on with the sale in spite of what his mother said, because he wanted to buy Sandpan. Witness was twenty-two years of age then. His mother did not want him to sell but he did. Subsequently he heard his uncle claimed the whole farm and witness went to Weise and told him that other people were claiming the ground, so he offered to Wiese to drop £100 on the sale, and make up another document by which he should, if the ground were found not to belong to witness and his brother-in-law, repay to Wiese his £500 with 6 per cent. interest. That document was signed in September, 1888, and in 1892 a third document was signed. Wiese had sent him a notice that Ras had bought the farm, and that witness must issue summons against Ras. Witness, his brother-in-law, and Wiese came down together to Cape Town, and witness told Wiese that if they lost the case Wiese would have to pay the costs. Wiese, however, said he was not obliged to pay the costs of the lawsuit, and so it was arranged to draw up the third document, by which, if they lost the case, Weise should pay the costs, and they in return agreed, if they won the case, to forego the £1,000 still owing by Wiese under the "koop brief." They won the case, but witness never had received his witness's expenses. Witness said to Wiese, "You have got the ground for nothing," meaning for £500. He valued the property which Wiese had got for £500 at from £2,500 to £3,000. Witness had meanwhile found out that his mother was entitled to a half-share, and he told Wiese so. Wiese said witness was crazy to say so. The £500 was paid by Wiese in 1889, and witness used the money to buy the farm Sandpan, for which he gave £900. His mother and step-father occupied Sandpan, paying £15 rent for nine months, and his father-in-law also had to work on the farm.

Cross-examined by Mr. Jutta: In 1886 the property was divided, and after that witness entered into negotiations with one De Villiers to sell his rights. De Villiers offered to pay £1,200 for half the farm Abuyspoort. That was the same property as Wiese afterwards bought for £1,500. In the action against Ras, witness and his brother-in-law claimed the half of Abuyspoort.

S. Cornelius, agent acting for the plaintiff, said that in the end of 1892 her present husband made a communication to him which resulted in correspondence between Messrs. Van Zyl and Buissinne and witness regarding the plaintiff's rights. Wiese had entered into possession of the half of the farm acquired by him. It would be worth from £2,500 to £3,000, and a fair rental for it would be about £150 a year.

His Lordship informed Mr. Innes that the defence might now be proceeded with, as there was a sufficient *prima facie* case for the plaintiff.

A. T. Wiese, the defendant, said he took possession of the half of the farm on the death of old Mrs. De Villiers. Had since built a large house on it and effected improvements. The value of the improvements was £500, and they were nearly finished when in November last he received a summons. That was the first he heard of any attempt to eject him. The half of the farm was sold to him by the two young men. The reason the "koop brief" was not signed on the spot was because witness should first hear from Lucas's mother that she was satisfied with the sale. He accordingly went to her and explained the conditions of sale. She was entirely satisfied, as witness was to pay £500 down, and she said that would be a timely sum to get them out of difficulties. He also went to old Mr. Westhuizen to acquaint him of what his son proposed to sell.

The Chief Justice: Did she know she had rights—that she was entitled to half the farm?

Witness: I thought she did not fully know her rights.

The Chief Justice: Then why did you not get her to sign the "koop brief"?

Witness: I never thought of it.

Examination continued: Would not have bought the property from the young men unless the mother had consented. Had his doubts about it, because he knew she had been married in community. He had paid £500 altogether for the half of the farm. Did not get the plaintiff's consent to the two variations in the "koop brief." They applied the £500 to the purchase of Sandpan. [Witness here gave similar evidence to that of Lucas Steenkamp as to why the variations from the original agreement were made.] The first variation was that he was to bear the brunt of any action in consideration of the sum of £100, and the second variation was that witness was to run the risk of the costs of the action against Ras. In consideration of this he was to pay nothing over and above the £500 already paid by him, being therefore exempted from paying the other £1,000. Thus, if they won the action he would have the property for £500, and if they lost it he would have to pay the law costs. They won the case.

Andries Wiese, son of the defendant, said that he heard the plaintiff consent to the young men selling all these rights.

Mr. Leenberg said that he went to the plaintiff as messenger from Mr. Wiese, and she said that she was glad her son would get the £500, as he would be able to acquire Sandpan.

Mr. Innes was not called upon.

Mr. Juta addressed the Court for the defence. Judgment was delivered for the plaintiff.

The Chief Justice said: In this case it seems perfectly clear to me that at the time when the defendant purchased the half of the farm Abuyspoort from Van der Westhuizen and Steenkamp, both the purchaser and the sellers believed that the sellers were entitled to sell the full half, and I am satisfied also that when the consent of Mrs. Steenkamp as the mother of Steenkamp and mother-in-law of Van der Westhuizen was asked, that she at that time firmly believed that the two were entitled to the whole of this half-share. The only circumstance that came out in the evidence tending to the contrary view, is the fact that in the year 1869 the plaintiff signed a liquidation account, from which it appears that one-half of that farm belonged to her husband's estate. It appears, however, that this fact was not even known to the counsel for the defendant, and it was only on inquiry made by the Court that the liquidation account was produced, and if that had not been produced there would not have been a tittle of evidence to show that Mrs. Steenkamp knew anything whatever of her rights under the will of her father-in-law. Now, it must be remembered that this was in the year 1869, when she was quite a young woman of twenty-three years of age. In that year this account was signed. It was written in the English language, and I am perfectly satisfied that she does not understand English. It is also clear that it was sent to her with a pencil note showing where she had to sign. I am perfectly satisfied that she did not know at the time the full purport of the document. Now I quite agree with what Mr. Juta has said as to the danger of holding that a person is not bound by a document signed by him, the principle is that every person is bound to know the full force and effect of documents which he signs; but if all the circumstances show that the person did not so understand them, and if there is no reason to believe that great blame attaches to that person for not fully understanding what he has signed, then the principle referred to would not apply; and in this case even the defendant himself is bound to admit that at the time he consulted the plaintiff about the sale she did not know what her rights were. That was his own admission in the box; when the question was put to him he said he believed she did not know. If she had known at that time that she was entitled to one-half of this farm by virtue of her marriage in community of property, I am perfectly certain that she would not have consented to this

sale. I leave out of the question her denial. It is true that we have the evidence of the defendant's son that she did know, but it is unpleasant to have to decide on questions of credibility, and therefore I prefer to accept the defendant's own evidence. But on that evidence there is not sufficient to show that she had given consent, as executrix, so far as her own half-share was concerned. So far as her sons' share is concerned, however, it would be hard to deprive the defendant of the rights he acquired under his agreement. It is an extraordinary thing, that if the consent of the plaintiff was required in the first instance, that she was never consulted at all in the arrangements made subsequently. On the first agreement, which is highly favourable to the sons, she was consulted, but when afterwards further arrangements were made, which considerably modified the original purchase note, the mother is in no way consulted, but with the two young men alone the arrangements are made. Now, if she did not at the time fully understand that she was the owner of one-half of the farm, I do not think that what passed between her and the defendant can deprive her of her rights. Moreover, we must bear in mind that she was at the time acting in the capacity of executrix of her husband's estate, and that as executrix she was bound to administer the estate faithfully and in the interests of the estate. It would have been entirely against the interests of the estate if, knowing that the whole of this property belonged to the estate, she had allowed the sons, who were entitled only to one-half of this property, to dispose of the whole and pocket the whole of the purchase price. The very fact that she allows the sons to pocket the whole purchase price, and does not take one penny for herself out of the estate, satisfies me that she did not know of her rights. Nothing has taken place in the nature of a waiver, or "estoppel," which prevents her now from claiming, at all events, occupation of one-half of the farm. In fact, the defendant had no right in the first instance to go upon the farm. She, as executrix of the estate, was entitled to one-half of the farm, and she had a right to prevent the defendant from going on the land at all. But it would, as I said before, be inequitable now to deprive him of the occupation of at least one-half of the farm. He must, however, pay for the occupation of the other half for the full year he has been in occupation, and it is only a moderate estimate to say that the sum of £50 shall be paid for this. Judgment will therefore be given

for the plaintiff for £50 damages. The Court will declare that the defendant is not entitled to the use or occupation of more than one-half share of the farm Abuyspoort, transferred to the plaintiff in her capacity as executrix of the estate of her late husband, and that he is not entitled to claim the rights under the purchase by him from the son and son-in-law until he shall have paid to the executrix the sum of £125. She has paid £250 out of her own pocket, it is said, to the estate of old Steenkamp for the purpose of obtaining this transfer. Of course she was bound to pay this amount in her capacity of executrix, and therefore in that capacity she is entitled to recover one-half of the amount from the purchaser of the sons' rights. As to costs, the plaintiff has recovered part of her claim, and there has been no tender by the defendant, and therefore I think the defendant must pay the costs.

At the request of Mr. Innes, the Court allowed plaintiff's expenses as a witness.

Their lordships concurred.

[Plaintiff's Attorney, C. C. Silberbauer; Defendants' Attorneys, Messrs. Van Zyl & Buissonné.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

PARKIN V. LIPPERT. { 1895.
Feb. 15th.

Mr. Searle, Q.C., on behalf of the defendant, applied for extension of time in which to file his plea.

Mr. Innes, Q.C., for the plaintiff.

The Court granted an extension until the 22nd instant, costs of the application to be costs in the cause.

REGINA V. NEETHLING. { 1895.
Feb. 15th.

Theft—Act 35 of 1893—Evidence sufficient to justify conviction.

— — —
This case came on review from the Resident Magistrate of Prieska, and was now argued on behalf of the prisoner. The prisoner was charged with the crime of theft of stock, in contravention of Act 35 of 1893, in that he did on or about

the 14th day of January, 1895, kill a sheep, the property or in the lawful possession of one C. F. Benadie. The accused was found guilty and sentenced to twelve months' hard labour. The facts appear sufficiently from his lordship's judgment.

Mr. Benjamin was heard for the prisoner.

Mr. Giddy, for the Crown, was not called on.

The conviction was sustained.

The Chief Justice said: The appellant in this case is a white farmer, but we must apply to this case the ordinary principles which we apply to other cases in which prisoners are charged with thefts of stock. If the evidence against him is conclusive, the fact of his being a European farmer must be left out of sight altogether. Now, the evidence goes to show that the owner of the sheep, accompanied by a boy, was in search of some missing sheep: that they went by different routes to the place where their sheep had last been, and that there both of them found a dead sheep whose throat had recently been cut. The blood was warm, and there was every sign that the sheep had only just been killed. About six paces from the spot they found the footmarks of a horse which had been standing there, and in the immediate neighbourhood they found certain spoor. Well, the horse seems afterwards to have left the place, and they followed the footmarks of this horse till ultimately they came upon the accused at a place called Mackay's Put, and there the owner of the sheep compared the measure he had taken of the spoor with the prisoner's boots and he found that they corresponded exactly. He did not take the breadth, but the length corresponded exactly. Both witnesses say that the spoor which they saw had been made by the boots which this man wore. Now it struck me that it might just be possible that the prisoner was passing the spot, and seeing the sheep lying dead got off the horse to see what the cause of the sheep's death was. But the difficulty in adopting this theory is two-fold. In the first place the prisoner himself did not set up this defence. If the prisoner himself had said: "I was on the spot and got down from the horse to see why the sheep was lying there," there might have been something in it, but he denied having been on the spot at all, and said the boy who said he saw him there was a liar and that he had not been near the place. That is the first objection to the theory, and the other is that no other spoor was found in the neighbourhood but the spoor of this white man. Well, on evidence such as this coloured men are continually convicted, and there is no reason why a different conclusion should be arrived at in the case of the

prisoner. And there is this further circumstance, that the prisoner himself, when the suggestion was made to him to pay for the damage, at once consented to pay. No doubt afterwards he said he was not guilty, but it seems a strong admission of guilt on his part to consent to pay. An innocent man, who had only got down to see what the cause of the sheep's death was, would never have consented to pay for the sheep, with the death of which he had nothing to do. So I am perfectly satisfied that the man killed the sheep. The next question is with what object. Was it mere malicious damage, or with an intention to appropriate the sheep to his own use? Well, the presumption would be that the object was to appropriate the sheep. That presumption should be rebutted in some way or other, and it seems to be extremely likely that after he had killed the sheep he saw the owner of the sheep and the boy at a further distance coming towards him and rode off; and that if he had not seen anyone coming, he would have appropriated the sheep. Under these circumstances, I think the Court would not be justified in reversing the decision of the Magistrate, who had all the witnesses before him and is the best judge of the facts of the case. It is suggested now that the agent who represented the prisoner thought it was only a preliminary examination, and did not defend the case as he would have done had he known it was a trial case, but it appears to me that the agent was very shrewd throughout the case. His cross-examination of the witnesses for the prosecution, at any rate, was as long as the examination itself. The prisoner himself did not tender evidence, and it is too late now to say that the agent did not know the circumstances under which the case was brought before the Magistrate. The appeal must be dismissed.

Their lordships concurred.

[Attorney, G. Montgomery-Walker.]

SUPREME COURT

[Before Sir J. H. DE VILLIERS (Chief Justice),
Mr. Justice BUCHANAN, and Mr. Justice
UPINGTON, K.C.M.G.]

REGINA V. VYFER AND JAPTHA. { 1895.
Feb. 18th.

The Chief Justice mentioned these cases, which came on review before him as judge of the week from the Special Justice of the Peace at Laingsburg,

The first-named accused was charged with contravening section 10, Act 27 of 1882, in that upon or about the 11th day of February, 1895, and at or near the goods shed of the Laingsburg Station, the accused did unlawfully curse and swear. The prisoner pleaded guilty and was fined £1 5s., or one month's imprisonment with hard labour for the first eight days, and thereafter solitary confinement with spare diet every other day, subject to circular.

The second-named accused was found guilty of stealing an ox-hide from the Laingsburg Station, and sentenced to pay a fine of £2, or one month's imprisonment, the same sentence being passed as regards spare diet as in Vyfer's case.

The Chief Justice, referring to the first case, said: The sentence is not in accordance with law, nor was it justified by the circular. The prisoner was sentenced to hard labour, and therefore could not be sentenced to spare diet for more than two days in each week. Besides, the effect of the sentence will be that on one of the two days immediately preceding his discharge the prisoner will have to be kept on spare diet. The portion of the sentence relating to spare diet must be quashed. The same remarks apply to Japtha's case.

REGINA V. ABRAHAM AND OTHERS. { 1895.
Feb. 18th.

This case came on review from the Resident Magistrate of Clanwilliam.

The accused, Dirk Abraham, sen., Dirk Abraham, jun., April Dryer, and Griet Ruiters, described in the summons as vagrants, were charged with the crime of contravening section 2, Act 23 of 1879, in that between 1st January and 9th February, 1895, and at or near Riet Vlei, in the district of Clanwilliam, the accused did wrongfully and unlawfully wander about the said farm Riet Vlei without visible lawful means of support.

Dryer was acquitted, the other accused were found guilty and the following sentences passed: Ruiters to serve M. N. Smuts (the prosecutor), of Riet Vlei, for three months as farm servant at 4s. per month and food, to take effect from 12th February, 1895; Dirk Abraham, jun., to serve David van Zyl, of Riet Vlei, for three months as a farm servant, wages 8s. a month and food, to take effect from 13th February, 1895; Dirk Abraham, sen., to find employment on the farm Riet Vlei within forty-eight hours.

The Court quashed the convictions.

The Chief Justice said: The prosecutor in the case, Smuts, is one of the lessees of the farm. The two other co-owners, named Van Zyl, gave

evidence and said they had given the prisoners permission to be upon the place. However, the Magistrate found them guilty, with the exception of one of them, and sentenced one of the prisoners (Ruiters) to serve for three months as a farm servant under Smuts on the farm in question at 4s. per month, the sentence to take effect from the 12th February. Now that sentence is in direct opposition to the 11th section of Act 23 of 1879, which prohibits a prisoner being put to compulsory service under the person at whose instance the prosecution has taken place. The other prisoners were similarly indentured to the Van Zyls, but as they gave permission to the men to be upon the place, I do not think they can be treated as vagrants at all; for they were apprenticed to the Van Zyls, who were also the owners of the farm upon which these persons are said to have been vagrants. We are of opinion that the sentences must be quashed.

Mr. Justice Upington: I was the author of Act 23 of 1879, and I can only say that the convictions in these cases have been contrary to the spirit and letter of the law.

PIENAAR V. RATTRAY. { 1895.
Feb. 18th.

Partners—Summons—Non-joinder - Exception.

P. sued R. in a Magistrate's Court upon a promissory note signed by R. and his partner L., the latter being at the date of the issue of the summons domiciled in the S.A. Republic, and not within the jurisdiction.

The Magistrate sustained an exception of non-joinder taken by R.

Held, on appeal, reversing the Magistrate's decision that P. was justified in suing R., the partner within the jurisdiction.

Alcock v. Du Preez (Buch. 1875, p. 130) followed.

This was an appeal from a decision of the Resident Magistrate of Robertson in an action in which the present appellant, plaintiff in the Court below, sued the respondent (defendant) for the sum of £200 and interest from 2nd December, 1890, at 12 per cent. per annum, due on a promissory note, dated Klerksdorp, 2nd August, 1890, and signed by the defendant and by his partner at that date, one Le Roux.

The defendant excepted to the summons (1) on the ground of non-joinder, as Le Roux should have been joined in this action as co-defendant, and (2) that the summons was vague

and bad in law, inasmuch as it did not state that the partnership estate in the South African Republic had been excused, and that there was a deficiency.

The evidence went to show that Le Roux, the defendant's partner in a business carried on by them at Klerksdorp at the time the note was signed (the partnership being now dissolved), was living at present in the South African Republic, and not within the jurisdiction of the Magistrate.

The Magistrate granted absolution from the instance, each party to pay its own costs. The following being the reasons for the judgment:

From the record it is clear that on the day (2nd August, 1890) the promissory note was signed by Rattray and Le Roux, the partnership between these parties did still exist. That the original note was signed by Mr. Rattray on behalf of the firm, and the renewal thereof by Mr. Le Roux, also on behalf of the firm, and that the money was obtained for partnership purposes.

It was therefore held by the Court that the action should have been brought against Rattray and Le Roux, and not against Rattray alone.

The Court not being satisfied with defendant's plea, which stated that the partnership had been dissolved prior to the date of signing the promissory note in question, which, as from the further proceedings, it is clear that then at least the partnership did exist, did not allow him any costs as against plaintiff.

The plaintiff now appealed.

Mr. Jones, in support of the appeal: It is clear by R.-D. law that partners are liable *in solidum*. *Potier on Obligations* (Part II., ch. 3, No. 270) *Van Leeuwen's R.-D. Law* (Kotzé's Trans.), Vol. II., p. 370. As to English law, see rules framed under Judicature Acts, Order 16 Rule 14, *Diocley's Parties to an Action*. See also *Simpson & Co. v. Fleck* (3 Menz., 213); *Kidson v. Campbell and Jooste* (2 Menz., 293); *Jacobson v. Nitch* (7 Juta, 174); *Grotius* (3, 3, 8, 11), *Berwing v. Erasmus* (9 C.L.I., 123).

Mr. Rose-Innes, Q.C., for the respondent, relied on *King v. Porter, Hodgson & Co.* (Buch., 1879, p. 117); *Haarhoff v. Cape of Good Hope Bank* (4 H.C.R., 304); *In re Paarl Bank* (8 Juta, 134), and *Theunissen v. Fleischer* (3 E.D.C., 291).

The appeal was allowed with costs.

The Chief Justice said: Where partners are resident in this colony, it is certainly a convenient and proper practice that all the partners should be sued for a partnership debt. It is unnecessary now for the purposes of this case to decide whether a plea in abatement would be sustained by this Court according to

modern practice where all the partners havenot been sued, or whether it would not be sustained, but I have no doubt whatever that when one of the partners is absent from the Colony, the plaintiff would be quite justified in suing only those partners that remained in the Colony for the whole of the debt. This view was taken for granted in the case of *Alcock v. Du Preez* (Buch. 1875, p. 130), which was decided in this Court in 1875.

In the present case it was proved, although only incidentally, that one of the partners was not resident within the Colony. Therefore the plaintiff was quite justified in suing the partner remaining here. The appeal must be allowed with costs and the case remitted to the Magistrate to be tried on its merits.

[Appellant's Attorneys, Messrs. Findlay & Tait; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

OAKESHOTT'S TRUSTEE V. BANK { 1895.
OF AFRICA. { Feb. 18th.

Mr. Rose-Innes, Q.C., moved for the appointment of a commission to take the evidence of Mr. Schweder, who is at present in Cape Town, but who is sailing for England on Wednesday next.

No proceedings had been taken in the action further than an application made to the Eastern Districts Court for an interdict restraining the East London Branch of the defendant bank from parting with certain moneys, which interdict had been granted.

The Court made no order.

The Chief Justice said: Much as we should wish to assist the plaintiff I do not see a way of doing so. It does not appear that any action has been instituted. It is suggested that some steps have been taken in the Eastern Districts Court, but even if that is so it would be not quite proper for this Court to make an order. When the case comes to be tried before the Eastern Districts Court it might be said that the Supreme Court had no business to take evidence to be submitted to that Court. I have no doubt that, through courtesy, the evidence would be received, but at the same time this Court should not submit itself to the possibility of being told hereafter that it had no right to take the evidence. Therefore there can be no order.

REGINA V. VLAK. { 1895.
{ Feb. 19th.

Mr. Giddy applied for an order removing this case to circuit at Beaufort West. The prisoner

was indicted in the Supreme Court for contravention of the first clause of the 15th section of the Railway Regulations Act of 1861.

Order granted.

Ex parte BURMEISTER AND OTHERS—*Re*
"ERNESTINE."

Mr. Searle, Q.C., applied for an order making absolute a rule *nisi* calling on the master of the Ernestine to show cause why the vessel should not be attached for the purpose of founding jurisdiction in an action for debt.

Order granted, costs to be costs in the cause.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS (Chief Justice)
Mr. Justice BUCHANAN, and Mr. Justice
UPINGTON, K.C.M.G.]

HILL BROS. V. REICH. { 1895.
{ Feb. 20th.

Mr. Juta, Q.C., moved for an order to set aside the bar and to allow the defendant an extension of time within which to plead.

Mr. Sheil, for the plaintiffs, consented on condition that the case was allowed to be set down for trial not later than 13th March.

An order was granted extending the time for filing the plea for seven days, costs to be costs in the cause.

BEEBLE AND CO., LIMITED.

Mr. Searle, Q.C., applied on behalf of the directors of this company, in conjunction with creditors, for an order placing the company in liquidation under the Companies Act, 1892.

Order granted.

TRAUTMANN V. IMPERIAL FIRE { 1895.
INSURANCE COMPANY, LIMITED. { Feb. 20th.

Plea in abatement—Fire policy—Cession—
Proper person to sue.

T.'s premises, insured by the defendant company, having been destroyed by fire, the company in terms of its policy undertook to reinstate the premises.

Previous to the fire T. had assigned all his right, title, and interest in the policy to S., and had given the company notice of the cession.

The premises not having been rebuilt to T.'s satisfaction he sued the company for the amount of the policy.

Held, on a plea in abatement, that S. was the proper person to sue, not T.

This was an action instituted by William Trautmann, of Hout's Bay, against James van Breda, as agent in Cape Town of the defendant company.

The declaration alleged that on or about 7th October, 1893, the defendant issued a certain fire policy, No. 2,191,879, under and by virtue of which policy the defendant, acting for and on behalf of the company, and under certain conditions, and in consideration of a certain premium paid to him yearly, agreed and undertook to insure against all risks from fire certain house and property situated at Hout's Bay, as set forth in the policy.

That on or about the 25th April, 1894, when the policy was in full force and effect, the house and premises insured under the policy were destroyed by fire, by which the plaintiff was damaged to the extent of £100, the amount of the policy, the defendant being liable for the damages sustained.

That thereafter the defendant admitted liability under the policy, and agreed and undertook to rebuild the premises, and proceeded to do so, but did it in such a negligent, bad, and incompetent manner that the plaintiff protested as the rebuilding was proceeding against the workmanship and construction. That thereafter the defendant tendered delivery of a house which he had caused to be constructed in place of that which was destroyed, but the plaintiff refused, and still refuses to accept the premises so built in satisfaction or return for those destroyed, owing to the premises being improperly built, in bad condition, and uninhabitable.

That the plaintiff, owing to the conduct of the defendant in keeping him out of his residence wrongly or his neglect in fulfilling his agreement, has suffered still further grievous wrong and injury to the extent of at least £50.

The plaintiff claimed :

(a) An order compelling the defendant to reinstate the building in a proper, habitable, workmanlike manner as nearly as possible to its former condition, or in the alternative the sum of £100, the amount of the policy.

(b) £50 damages owing to his not having had beneficial occupation of the premises.

(c) Alternative relief and costs of suit.

The defendant specially pleaded :

That on the 7th October, 1893, the plaintiff duly ceded his right, title, and interest by

writing endorsed thereon in the policy referred to in the declaration to, and in favour of the Rev. Johan Frederick Stegmann, in his capacity as the treasurer, for the time being, of the Pniel Ministers' Sustentation Fund, as security for a debt then owing by him to the said Stegmann in his said capacity.

Notice of the cession was by the plaintiff given to the defendant, who consented to the same, and duly registered the cession in the books of the company.

The debt, hereinbefore referred to, is still owing by the plaintiff, and the cession has not been rescinded and is of full force and effect.

The said Stegmann is the proper person to sue in any matter concerning the said policy.

Wherefore the defendant prays that the declaration may be dismissed with costs.

For a further plea should the above be deemed insufficient, but not otherwise, the defendant, after admitting the formal allegations in the declaration, and the liability of the company to indemnify the plaintiff for his loss, said that, as representing the company, he undertook to reinstate and rebuild the said premises, as he had a right to do in terms of the contract, and that he did duly reinstate and rebuild the said premises, and subsequently tendered possession to the plaintiff before the commencement of the action, but that the plaintiff refused to accept the premises rebuilt in lieu of those destroyed by fire. The defendant specially said that the premises had been duly and properly rebuilt, and were in every respect equal and equivalent to the premises which were destroyed.

The replication denied the defendant's conclusion of law, and specially that Stegmann was the proper person to sue and generally joined issue on the plea.

Mr. McLachlan appeared for the plaintiff.

Mr. Rose-Innes, Q.C., and Mr. Sheil for the defendant company.

Mr. McLachlan asked for leave to amend the replication by alleging that the cession to Stegmann had been cancelled.

Mr. Rose-Innes, Q.C., consented to the amendment on the understanding that the onus was on the plaintiff to prove the cancellation.

The company's policy book was then produced, which contained a note having reference to the policy sued on to the effect that as £80 11s. (the amount which it cost the company to reinstate) had been paid the *policy* was cancelled.

Mr. Rose-Innes, Q.C., pointed out that if the plaintiff relied on this entry as an admission then he was out of court, as payment had been made. On the plea in abatement he relied on *Vost* (18, 4, 15); *Fick v. Bierman* (2 Juta, 26);

Van der Byl v. Findlay and Kuhn (9 Juta, 178), and *Wetzlar v. The General Insurance Company* (3 Juta, 86).

Mr. McLachlan referred to *Bunyon* (p. 193), and cited *London Investment Company v. Montefiore* (9 L.T., p. 688) in support of his contention that where a fire policy had been assigned in the absence of express contract the Insurance Company was not bound to pay the assignee. As to interest of mortgagor, see *Arnould on Marine Insurance* (p. 83). He urged that whether Stegmann should have sued on the policy or not the plaintiff was entitled to sue the company on the agreement to reinstate, which was alleged in the declaration and not denied in the plea.

Mr. Rose-Innes, Q.C., in reply pointed out that the declaration did not allege with whom the agreement to reinstate had been made, and referred to the correspondence to show that the agreement to reinstate had been made with the assignee's agent, and that no communication on the subject had passed between the company and the plaintiff.

The Court suggested that the assignee's agent might consent to his name being added to the record as co-plaintiff, as all the witnesses were in court.

Mr. McLachlan expressed the plaintiff's willingness to indemnify the assignee for any costs which might be incurred if the course suggested by the Court were adopted.

Mr. Rose-Innes, Q.C., remarked that although anxious to adopt the suggestion of the Court the assignee's agent could not take the step suggested without communicating with his principal. In any case the plaintiff's personal indemnity for the costs could not be accepted.

He also directed the attention of the Court to the fact that it was the plaintiff who had set the case down for trial. His proper course was to have set the case down for argument on the plea in abatement. The legal point could then have been settled and the costs of the witnesses' attendance would not have been incurred. The company could not be blamed for the course which the plaintiff had adopted.

The Court allowed the plea in abatement with costs.

The Chief Justice said: The cession of this policy was an out-and-out cession. Mr. Trautmann "cedes and transfers all his right, title and interest in and to the within policy to and in favour of Mr. Stegmann as a further security for a sum of money due by him," &c. It is quite true that although this is an out-and-out cession, its effect is to make it a pledge of this policy; but so long as the debt is unpaid this pledge is quite equal to a cession so far as the

cessionary is concerned. He is entitled to all the rights in respect of this policy until the debt is paid—that is the position of the cessionary of the policy. The insurance company could not pay anything to, or enter into any arrangement with the debtor (Mr. Trautmann). Mr. McLachlan has cited some English cases, which I do not think bear on this case, but even if they had a bearing they only refer to the law of insurance, and not to the law of cession. We have adopted the English law of insurance, but we have not adopted the English law relating to cession. Under the circumstances it appears to me that the only person entitled to sue is Stegmann, who has the cession of the policy and whose debt is not paid, and the plea must therefore be allowed with costs. At the same time I would suggest to the parties that as all the witnesses are here, it would be desirable to come to some arrangement by which the case may be heard. If Mr. Stegmann has a representative in court who is authorised to consent to his being made the nominal plaintiff on the record, the case could be proceeded with.

The assignee's agent having declined to accept the responsibility without communicating with his principal,

The Chief Justice said: The plea will be allowed with costs, including the costs of the witnesses, as the plaintiff himself set down the case for trial.

Their lordship concurred.

[Plaintiff's Attorney, H. P. du Preez; Defendant's Attorney, C. C. Silberbauer.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS (Chief Justice),
Mr. Justice BUCHANAN, and Mr. Justice
UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

HARTFORD V. WALKER. { 1895.
Feb. 21st.

Mr. Currey moved for an order compelling the defendant to deliver a good-for.

Granted.

Ex parte PHILIP CHARLES JACOBSON.

Mr. Graham moved for the admission of the applicant as an attorney and notary of the Supreme Court.

The applicant duly affirmed, and was admitted.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE DANIEL STUURMAN. 1895.
Feb. 21st.

Mr. Tredgold applied for authority to the Registrar of Deeds to pass transfer of certain farm situated in the district of Queen's Town, on the Bengu Stream, to the eldest son of the said late Stuurman, he being entitled thereto by virtue of the law and custom of the Tembu tribe.

The facts are these :

Daniel Stuurman, a Tembu, of Bengu in the Tambookie Location, Queen's Town, holding a certificate of citizenship, was married under native custom to Sartyi, and had issue four sons and three daughters. On Sartyi's decease, he married one Leah, whom he predeceased and by whom he had no children.

Hana, the eldest son of Daniel, applied (under sections 2 and 3 of the Native Succession Act 19 of 1864, and in accordance with the native custom applicable thereunder) that the Registrar of Deeds be authorised to pass transfer to the petitioner of a certain piece of land situate at Bengu and held at his death by Daniel on perpetual quitrent.

Rule granted calling upon all persons to show cause on the 13th April why transfer should not be effected. The rule to be served on the children of the deceased who had not joined in the present application.*

IN THE MATTER OF THE CAPE OF GOOD HOPE BANK. 1895.
Feb. 21st.

Mr. Innes, Q.C., moved for authority to the official liquidators that they may be authorised to return to the contributories on 326 shares the sum of £3 10s. 6d. per share, being the difference between £4 5s. paid and 14s. 6d. amount now found to be due, and to the contributory on nine shares the sum of £1 9s. 2d. per share, being the difference between the amount paid by him, viz., £4 10s. per share, and the amount now found to be due, viz., 14s. 6d., plus £2 6s. 4d. = £3 10s. 0d. per share. The Court ordered that a rule *nisi* issue, returnable on the last day of term (Thursday, 28th February, 1895), calling on all persons concerned to show cause why the prayer of the petition shall not be granted. A copy of the petition to lie for inspection at the office of the official liqui-

* On the return day the rule was made absolute.

Rep.

dators in the meantime. One publication of the rule in one of the English newspapers in Cape Town.

IN THE MATTER OF THE MINORS KRUGER.

Mr. Sheil applied for authority to the mother of the said minors to raise a sum of money on mortgage on the farm Quaggasfontein, situated in the district of Queen's Town, bequeathed to the minors by the joint will of their deceased father and surviving mother, for the purpose of erecting fencing and other improvements thereon.

No order was granted.

The Chief Justice said: It is impossible to make the order. It has not transpired what age the petitioner is or to what extent the minors, whose interest the Court is concerned in, would benefit by the expenditure. The petitioner is not without means, and at any rate should first spend the money, and then afterwards show to what extent the minors would benefit by the improvements.

DICKSON V. DICKSON.

Mr. Watermeyer moved for an order setting down the hearing during the present term of the suit instituted by the plaintiff against his wife for restitution of conjugal rights, failing which for a decree of divorce, personal service of the citation and interdict having been effected.

Order granted, setting the case down for hearing on the 27th February.

THE PETITION OF ANDRIES TABATA AND OTHERS.

Mr. Molteno applied for authority to petitioners to raise a sum of money on mortgage of the farm Tabata, situate in the district of Queen's Town, for the purpose of freeing the same from an unsatisfactory lease and for satisfying debts due by petitioners.

The Court made no order.

SCHMIDT V. SCHMIDT'S EXECUTORS.

This was an application to make absolute the rule *nisi* restraining the respondents from alienating any portion of Schmidt's estate, and suspending the operation of an order of this Court, made on the 18th September last, regarding the disposal of the assets pending an action for a declaration of rights.

The applicants did not appear.

Mr. Searle, Q.C., who appeared for the defendants, asked that the rule *nisi* be set aside.

The rule was set aside with costs,

IN THE ESTATE OF THE LATE MARGARETHA LE ROUX AND SURVIVING SPOUSE.

Mr. Juta, Q.C., moved for the appointment of a *curator ad litem* to represent the minor children of Abraham J. Wannenbergh in any proceedings which may be instituted in regard to the will disposing of the property of the said estate.

Order granted, appointing Mr. Lind *curator ad litem*.

IN THE ESTATE OF THE LATE JAN A. VAN WYK.

Mr. Juta, Q.C., made a similar application respecting the minor children of the late Jan A. van Wyk.

Order granted, appointing Mr. Lind *curator ad litem*.

COOK AND ANOTHER V. COLONIAL GOVERNMENT.

Mr. Sheil applied for the appointment of a commission to take the evidence at East London of William B. Chalmers, a witness for the plaintiffs, who is unable through illness to attend the trial in Cape Town.

The Court granted the order, and appointed the Resident Magistrate, or in his absence the Assistant Resident Magistrate of East London, commissioner.

WOLFF V. SOLOMON'S TRUSTEE. { 1895.
Feb. 21st.
" 22nd.

Minor—Insolvency—Fraud—Ratification—

Delivery of title deeds—Power of attorney.
The plaintiff's father, two years before his insolvency, purchased a farm in the Transvaal for his daughter and had the same transferred in her name.

Two years after the date of insolvency the defendant, as trustee of the insolvent estate, obtained from the insolvent the title deeds of the farm and a power, signed by the plaintiff, who was still a minor, authorising the transfer of the farm, upon the insolvent's admission that the price of the farm had been paid in fraud of his creditors.

The defendant never took any steps to have the transfer to the minor set aside or to recover the purchase price from the minor assisted by a curator.

The plaintiff married while still a minor and was not aware of the delivery of the title deeds until it was discovered by her husband two years after the marriage.

Nine years after such discovery the plaintiff brought an action to recover the title deeds and to have the power declared of no effect. Held, that, in the absence of sufficient proof of fraud, or of ratification, the plaintiff was entitled to succeed.

This was an action for delivery of title deeds and for £5,000 damages, instituted by Mrs. Julia Wolff (born Solomon), (married without community of property to Victor Wolff, and duly assisted by him as far as need be), against William Dunn, a partner in the firm of Mackie, Dunn & Co., of Port Elizabeth, in his capacity as sole trustee in the insolvent estate of Hyman Henry Solomon, as well as in his individual capacity.

The material allegations in the declaration were as follows:

2. The plaintiff is the duly registered owner of the farm Paris, situated in the Zoutpansberg district of the South African Republic, which was transferred into and registered in her name in the Deeds Registry of the South African Republic in or about the 22nd September, 1874.

3. In or about the month of April, 1876, the estate of the late Hyman Henry Solomon, who was the father of the plaintiff, was sequestrated as insolvent. The said Solomon was then resident at Port Elizabeth, and the defendant was thereafter duly appointed and confirmed as the sole trustee of his estate.

4. In or about the month of February, 1878, the plaintiff signed a power of attorney in favour of one James MacAlister, then a partner in the said firm of Mackie, Dunn & Co., authorising him to sell and transfer the said farm for the benefit of the insolvent estate of her father, the said Solomon. And the said Solomon thereafter handed the title deeds of the said farm to the defendant, who still holds them.

5. The plaintiff received no consideration for signing the said power, or for parting with the said title deeds, and at the date when she signed the said power she was a minor of the age of seventeen years or thereabouts.

6. In or about the year 1887 the said MacAlister substituted one Macfarlane, of Port Elizabeth, also a partner in the firm of Mackie, Dunn & Co., to act for him under the said power. A copy of the said power is hereunto annexed, and the plaintiff prays that it may be considered as part of this declaration.

7. The plaintiff was married to the said Wolff in or about the year 1879.

8. Thereafter the plaintiff repudiated the said power of attorney and gave notice of the fact to the defendant and demanded delivery from him

of the said title deeds of the said farm. The plaintiff has always been and still is willing to repay to the said defendant any expenditure incurred by him in paying taxes and dues in respect of the said farm, and before action she tendered, and hereby again tenders, to pay to the said defendant all amounts so expended.

9. The defendant wrongfully and unlawfully refuses to give up the said title deeds, and claims to retain them as an asset in the estate of the plaintiff's father, who is now dead.

10. By reason of the wrongful conduct of the defendant as aforesaid, the plaintiff has been prevented from dealing with and disposing of the said farm, and has suffered damage to the extent of £5,000.

The plaintiff claims :

(a) An order compelling the defendant to deliver up to her the title deeds of the said farm.

(b) An order declaring the said power to be of no legal force and effect.

(c) The sum of £5,000 for damages as aforesaid.

(d) Such alternative relief as to this Honourable Court may seem meet.

(e) Costs of suit.

The defendant pleaded that the insolvent purchased the farm before his insolvency with his own money, and thereafter fraudulently procured the farm to be registered in the name of the plaintiff for his own convenience, and in order to evade his creditors at a time when he was pressed by them and was unable to pay his just debts, but the transfer is for the above reasons void and invalid, as having been made in fraud of creditors.

He further said that after the insolvency of the plaintiff's father, the plaintiff, in order to enable the defendant to obtain transfer of the farm in his own name and in his capacity as trustee, and to make the farm available for the creditors of the estate, with the assistance of her father executed the power of attorney in favour of James MacAlister, who was then acting as defendant's agent.

That the plaintiff had full knowledge of the facts, and ever since her majority acquiesced in and ratified the above acts of herself and her father, and is therefore not now entitled to bring this action.

That he (defendant) had paid all taxes and dues in respect of the said farm since the date of the signing of the power, amounting in all to the sum of about £73 8s. The said farm would otherwise have been forfeited to the Government of the South African Republic.

He admitted that he refused to give up the title deeds of the said farm, and said that the

farm is, under the above circumstances, an asset in the insolvent estate, in which there is still a large deficiency, and that he is entitled to administer the said farm for the benefit of the insolvent estate.

The defendant claimed in reconvention :

(a) A decree ordering the plaintiff, assisted by her husband, to execute all necessary powers to enable him to obtain transfer of the farm into his name.

(b) Further relief and costs.

In her replication, upon which issue was joined, the plaintiff denied that the insolvent purchased the farm Paris with his own money, and fraudulently caused transfer to be passed into her name in order to evade his creditors at a time when he was unable to pay his debts.

She also denied that since her majority she had acquiesced in and ratified the power of attorney.

Mr. Rose-Innes, Q.C., and Mr. Watermeyer for the plaintiff.

Mr. Searle, Q.C., and Mr. Oastens for the defendant.

Victor Wolff deposed that he was married to the plaintiff under ante-nuptial contract in 1879. His wife at present resided at Wynberg; he at Johannesburg. When he married he heard that his wife had an interest in the property, but only knew it definitely in 1881, when he came back from England. Witness was asked to sign a power of attorney respecting the property, but declined to do it; that was in the presence of Mr. Solomon. Was told that a Mr. Dunn, of Mackie, Dunn & Co., held the title deeds. In 1874 Mr. Solomon, his wife's father, was apparently a rich man at Port Elizabeth. About the beginning of 1883 witness again went to England, but in the meantime he had been to the Transvaal. While there he made inquiries on the subject of the farm Paris. While witness was in England in 1883 he met Mr. Dunn, and they had a conversation about the farm. Dunn asked him why he would not sign a power to transfer, and witness replied that he would not alienate it from his wife, as its value was likely to increase. At that time witness was not in good circumstances, and parties were holding bills over his head, but he still refused to sign. Remained in England till 1885, when he became bankrupt. Had since paid all his debts. Went to Kimberley, and remained there till February, 1888. Up to that time was not in a position to take proceedings at law. Was in straitened circumstances when in February, 1888, he went to the Transvaal. On the 13th May, 1889, he first instituted proceedings by writing to Mr. Dunn asking him where the title

deeds of the farms Paris and Balloon were. The reply was that the deeds were in Mr. Dunn's possession, by virtue of his position of trustee in the estate of Mr. Solomon, his wife's father. Witness had had good samples of gold quartz purporting to come from the farm Paris. First heard there was gold on the farm in 1889. It was about thirty miles from the terminus of the Selati railway, and might turn out very valuable. In 1888 he instructed his solicitor (Te Water, of Pretoria) to pay taxes on the farm. Te Water died, and left his affairs in a muddle, and the receipts for the taxes paid by witness could not be found. Mr. Nel succeeded to Mr. Te Water's business, and sent him certain receipts produced in court. In May, 1889, he lodged a caveat with the Registrar of Deeds at Pretoria; the farm remained to date registered in his wife's name. On the 22nd June, 1889, he instructed his solicitor (Mr. Chabaud) at Port Elizabeth to demand the title deeds from Mr. Dunn. Did this because at that time he could have floated the farm into a company at once. Received a reply through Mackie, Dunn & Co., stating that Mr. Dunn was resident in London, and that there had been no time to fully investigate the position which Mr. Dunn held, and referred to the suddenness of the claims of witness after a lapse of many years.

Cross-examined by Mr. Searle: First went to the Transvaal about the end of 1882. From 1883 to 1885 was in England; from 1886 to 1888 in Kimberley, and at the Transvaal since 1888. First written communication of any kind he made with regard to the farms was in February, 1889, and that was when he found the farm was likely to be gold-bearing. If the taxes were not paid on farms they were forfeited to the Transvaal Government after notice of forfeiture had been given to the owners. Mr. Solomon died in 1887 in the Transvaal. Shortly after he arrived in the Transvaal in 1888 his pecuniary position improved, and it had gone on improving considerably. In 1889 he paid the arrear taxes on the farm from 1885 or 1886. His attorneys had searched, but could only find the receipts for 1890 to 1893. Did not know that Mr. Dunn, in his capacity of trustee, had paid the taxes for many years. An action was brought by Mrs. Davis, his wife's sister, with regard to the other farm, Balloon. Witness had nothing to do with that action. It was only in 1881 that he actually knew that the title deeds were in the possession of Mr. Dunn. Wrote to him in 1889 with the object of ascertaining if they were still in his possession.

By the Court: Had he been called upon he would have found means during the time he was

in straitened circumstances to pay the arrears of taxes on the farm; but he was too poor then to institute legal proceedings.

Mrs. Julia Wolff, the plaintiff and wife of the last witness, deposed that she was thirty-three years of age, and lived at Wynberg. In 1874 was living with her father at Port Elizabeth. Remembered her father went to the Transvaal in 1874, and when he came back he told witness he had bought two farms; one for her sister and one for herself. Signed the document in 1878 (produced) at the request of her father. Did not know what was in the document. In 1876 her father's estate was sequestrated, and before then her father kept a good house and lived very well. At the time of her marriage she knew nothing more about the property than she had just stated, and after her marriage her husband looked after her business entirely.

Cross-examined: Witness was educated in England. Lived at the house of Mr. and Mrs. Hyam Benjamin at Lancaster Gate, London. At the time her father came back from the Transvaal, witness was in Port Elizabeth, and her sister (now Mrs. Davis) at Mr. Benjamin's house. Did not know anything about Mr. Benjamin having given her father money. Did not know why her sister should have said that the farm Balloon was a present from Mr. Benjamin. When she signed the document in 1888 her father did not tell her that the property really belonged to his insolvent estate.

Re-examined: Could not fix the date when she first knew that the title deeds were still in her name, but it was a year or two after her marriage. Had never received anything in respect of the property.

This closed the evidence for the plaintiff.

Mr. Searle submitted evidence taken on commission in London in March, 1894. Mr. William Dunn stated that he was member of Parliament for Paisley. In 1876 Mr. Solomon became insolvent with liabilities of £46,000, of which £33,000 was due to the firm of Mackie, Dunn & Co. Witness was appointed sole trustee, and a dividend was paid of 1s. 1d. in the £. The title deeds of the two farms were placed in his hands as part of the estate. Mr. Solomon told him that he had paid £100 for each farm, and handed over the title deeds to witness saying that they belonged to his estate, and that he had wrongfully transferred them to the names of his daughters; and asked witness not to prosecute him. Mr. Solomon admitted to witness that he was hopelessly insolvent when he purchased the farms. In the year 1876 Mr. Solomon was an undischarged bankrupt under a previous bankruptcy. Witness left the Cape for England in

1877, leaving his power of attorney and the title deeds with Mr. MacAlister. He remained in undisturbed possession of the title deeds from 1876, and all rates and taxes were paid. Communicated at one time with agents in the Transvaal and tried to sell the farms. It was on the 13th May, 1889, that he first heard of the plaintiff making any claim on the farm.

The evidence of James MacAlister, taken on commission, stated that he held Mr. Dunn's power of attorney regarding the farm. Had paid taxes on the farms up to 1885. At that time the farms were not saleable. He employed agents in the Transvaal to try and sell the farms, but they had failed to do so.

Mr. Searle handed in accounts to show that the disbursements made by the defendants in respect of the farms amounted to upwards of £200.

Mr. Justice Buchanan: Do you claim to have this declared a fraudulent transaction under the provisions of the Insolvent Ordinance?

Mr. Searle said that that was a portion of his claim, but they relied on the common law relating to alienation in fraud of creditors.

Mr. Rose-Innes, Q.C., in support of the plaintiff's case, cited *Voet* (4, 1, 20), (17, 1, 17); and *Pottier on Obligations* (Vol. I., 122).

Mr. Searle, Q.C., relied on *Voet* (4, 4, 44); *Van Leeuwen's R.-D. Law* (Kotzé's Translation), Vol. II., p. 343; *Grotius* (1, 8, 8) (8, 48, 10—13); *Sandoz D. F.* (2, 9, 15); *Groenewagen ad Cod* (2, 41, 10—15).

Cur. ad vult.

Postea (February 22nd).

The Court delivered judgment.

The Chief Justice said: The plaintiff asks for an order to compel the defendant, who is trustee of the insolvent estate of the late H. H. Solomon, to deliver up to her the title deeds of the farm Paris in the South African Republic, an order declaring a certain power to transfer the farm given by the plaintiff of no legal force or effect, and the sum of £5,000 as damages for the detention of the title deeds by the defendant. The defence to the action is, firstly, that the farm had been fraudulently transferred to the plaintiff by her father shortly before his insolvency, and secondly, that after his insolvency the plaintiff, in order to enable the defendant to obtain transfer of the farm, with the assistance of her father H. H. Solomon, executed the power and that after she became of age she ratified these acts of her father and herself. As to the allegation of fraud there is not a particle of proof in support of it, except the vague evidence of a conversation between the defendant and the insolvent Solomon himself. Mr. Dunn, the trustee, says: "He

(Solomon) said he paid £100 each for the farms, and that as the farms belonged to his estate he handed me over the title deeds. This came out through my asking him what he had done with certain moneys belonging to his estate. He admitted that he had wrongfully transferred and registered these farms in the names of his daughters and begged me not to prosecute him, for he admitted that he was irretrievably insolvent when he purchased and paid for the farms. He also promised to get a power of attorney from his daughters to enable me to transfer the farms to any future purchasers." This evidence, even if it were admissible, would surely not be sufficient to deprive the plaintiff of her right to the farm on the ground of fraud. If the evidence is correct the proper course for the trustee would have been to recover from the minor the sum paid by her father for the farm, or else to have the transfer cancelled. For the purposes of such an action a *curator ad litem* would have been appointed for the minor, the circumstances of the insolvent at the time of the transfer would have been fully investigated, and the interests of the minor would have been duly protected. But without any such proceedings the trustee condones the father's alleged fraud and obtains a power to transfer to himself a farm, which, until the contrary is proved, must be held to have been lawfully transferred to the plaintiff. The transfer to the plaintiff, it should be observed, was not made by the father but by one Marais, from whom it had been purchased by the father on behalf of the plaintiff. Besides the evidence of a conversation with the insolvent there is no other proof of fraud. The fact that the plaintiff was only twelve years of age does not constitute such proof, more especially when it is borne in mind that the transfer was effected nearly two years before her father's insolvency. The power of attorney was not given until two years after the date of insolvency, and in the meanwhile there was ample time to have the minor's title to the farm set aside. In the absence of sufficient evidence of fraud the first plea must fail.

As to the second plea, it is perfectly clear that neither the delivery of the title deeds nor the execution of the power could in any way prejudice the plaintiff during her minority. Even if the power had been carried into execution by transfer of the farm *coram lege loci*, such transfer would have been null and void without the consent of a competent Court. On this point all authorities are agreed, and I need therefore only refer to *Voet* (27, 9, 8 and 9). No such transfer having been effected the full legal

title remains in the plaintiff and she is entitled to recover back the title deeds and have the power declared of no legal force or effect, unless she has lost this right by prescription or by ratification after she became of age. If prescription had been pleaded the question would have arisen whether the thirty years, or a lesser term of prescription applies to the present case. The plaintiff became of age by marriage in 1879 but the exact date was not stated in evidence. In 1881 the plaintiff, through her husband, discovered that the title deeds were in the defendant's possession. In May, 1889, he first took legal proceedings against the defendant. He explains the delay by his straitened circumstances until 1888, when he placed the matter in the hands of his solicitor, who died without instituting the action. The plea is that of ratification and not of prescription. To support this plea the defendant must prove that, after the plaintiff became of age, she in some way recognised the defendant's right to the possession of the title deeds, or the validity of the power of attorney, or did or said something inconsistent with her present claim. Beyond the mere lapse of time no evidence of acquiescence or ratification has been given.

The defendant himself took no steps before Mr. Solomon's death, which took place in 1887, to complete his title by obtaining a registered transfer. He knew that after the plaintiff became of age he required her consent in order to carry out the arrangement which he had made with her father. In 1881 his attorney requested the plaintiff's husband to sign a fresh power, and in 1883 the request was repeated by the defendant, but the plaintiff's husband refused on both occasions to consent to any alienation of her property. So far then from ratifying her father's acts she, through her husband, expressly refused to assist in giving effect to them. She did not, it is true, pay the rates and taxes which fell due before 1885, but there is no evidence of her knowledge that the defendant was paying such rates and taxes. Any payments so made by the defendant must of course be refunded and in her declaration she has tendered to repay the amount. Subject to such tender, judgment will be given in terms of the claims (a) and (b) with costs, excepting the costs of the summons, which does not contain any tender.

Mr. Justice Buchanan: I concur, and the only point which I thought required consideration was whether the defendant had established the 4th paragraph of his plea; that the plaintiff had full knowledge of the facts, and ever since her majority acquiesced in and ratified the acts of herself and her father. Of

course, this ratification might be either by express act or by conduct, but there has been no such conduct on the part of the plaintiff. Consequently, the plaintiff not having ratified the act of her father, she must now succeed in her suit.

Mr. Justice Upington also concurred.

[Plaintiff's Attorneys, Messrs. Trollip & Hutton; Defendant's Attorneys, Messrs. Scanlon & Syfret.]

Re BREEDLE AND CO., IN LIQUIDATION. { 1895.
Feb. 22nd.

Mr. Searle, Q.C., applied for an order appointing Messrs. Hanau, Fisser, and Kock official liquidators of the company with the ordinary powers under the 149th section of the Act.

Order granted, costs of the application to be costs in the liquidation.

STRASBURGER V. TREBOR FRERES.

Mr. Innes, Q.C., on behalf of the defendants, applied for an order postponing the date of the trial of this action for debt, set down for the 26th February, and appointing a commission to take the evidence of witnesses in Paris.

Mr. Searle, Q.C., consented on condition that the defendants paid the costs of the application and of setting the case down for trial.

The Court granted the order on condition that the applicants pay the costs of the application and of setting the case down for trial. Mr. Thomas Barclay, barrister-at-law, resident in Paris, was appointed commissioner.

MARKHAM V. WISEMAN. { 1895.
Feb. 22nd.

Guarantee—Action on.

This was an action on a guarantee for the sum of £34 15s., instituted by Mr. Henry William Markham against Mr. Alexander Kay Frame.

The declaration alleged that on or about the 26th, 29th, or 30th June, 1894, one Simon Wiseman was desirous of purchasing certain goods and merchandise from the plaintiff for the sum or price of £32 1s. 6d.

That Wiseman had been introduced to the plaintiff by the defendant, and the latter undertook and agreed that if the plaintiff would sell and deliver the goods upon credit to Wiseman, he (defendant) would guarantee the payment of the purchase price within thirty days from the date of sale.

That in consideration of the defendant's guarantee the plaintiff did sell and deliver the

goods upon credit to Wiseman, who thereafter failed to pay the purchase price, and the plaintiff called upon the defendant to satisfy the same and notified to the defendant that in default of payment of the purchase price by him the plaintiff would sue and excuse Wiseman, yet the defendant neglected to pay the amount.

The plaintiff thereafter obtained judgment against Wiseman in the Court of the Resident Magistrate of Cape Town for the sum of £32 6s. 6d., and took out a writ for the amount, to which a return of *nulla bona* was made. The taxed costs of the proceedings amount to £2 8s. 6d.

The plaintiff claimed the sum of £34 15s. with costs of suit.

The defendant in his plea denied that he undertook and agreed to guarantee in any manner the payment of the purchase price of the goods. Issue was joined on the replication.

Mr. Rose-Innes, Q.C., and Mr. Shippard for the plaintiff.

Mr. Jones for the defendant.

Henry Charles Abbott, salesman, in the employ of Mr. Markham, said that the defendant occupied an office in the same building, and about the 12th June last introduced Wiseman to the firm, asking Mr. Day, the manager, if he would open an account with Wiseman. Mr. Day declined, but said to Frame that if he would guarantee the payment of the goods supplied to Wiseman he would supply them. Frame replied, "Very well," and goods were accordingly supplied on June 12 to Wiseman to the amount of £16 4s. It was arranged that Frame should be consulted on each order from Wiseman. The goods were to be paid for in thirty days, and Frame paid the £16 4s. by cheque, getting 2½ per cent. discount. On the 26th June Wiseman ordered goods to the amount of £21 2s. 9d. Mr. Day saw defendant about the order, and the goods were supplied. Invoices were sent to both Wiseman and defendant. On the 29th June Wiseman selected further goods to the value of £11 3s. 9d. Witness served the goods, and put them aside as in the previous case. Saw Frame about it, and told him that Wiseman had been in again. Frame came to the office in the shop, and asked how much the previous lots came to. Frame looked at the ledger, and saw it was £21 2s. 9d. After considering a little while, he said, "All right, let him have these, but no more." Invoices were again sent both to Frame and Wiseman. Wiseman was entirely unknown to his firm.

Cross-examined by Mr. Jones: On the first occasion Frame asked his firm to supply Wiseman with goods. Could not remember the

exact words of the conversation that took place between Frame and Day, but he had stated what his impression was. The meaning of it was that Frame guaranteed and made himself responsible, if Wiseman did not meet this debt Frame was to do so. Frame was sued at Wynberg for these goods as principal debtor, and not as guarantor. Supposed that it was a mistake on the part of the firm's legal advisers. That case was lost because Wiseman had not been excused. Nothing was said at the first transaction with regard to future transactions. The conversation only referred to that first transaction. Witness here qualified this by saying that it was then arranged that Frame should be consulted at each future transaction. Myburgh was in partnership with Frame, but they only knew Frame in the matter. Could not say what benefit Frame received for guaranteeing. Supposed Frame kept the 2½ per cent. discount. On the second occasion, when Wiseman ordered goods to the amount of £21 2s. 9d., Day saw Frame, but witness did not know what took place. No letters were sent to Frame, only an invoice. Did not know from his own personal knowledge that Frame guaranteed the second lot, but when the third lot was ordered (the second lot of goods being made up, but not delivered to Wiseman) Frame guaranteed both lots together, and told witness not to give any further credit. This was the first guarantee witness had been interested in. Did not ask Frame for a written guarantee. Frame did not mention the name of Bekker, a partner in the firm of Sturk & Co. Did not hear Frame say he had money of Wiseman's, nor did he understand that that was a condition of the guarantee.

Joseph Gray Day, manager at Markham's, said that when Frame brought Wiseman, he said he was not opening any fresh accounts. Frame, however, said he would guarantee it, so the goods were supplied. Witness told Frame he would consult him on every transaction with Wiseman, and Frame acquiesced. Frame told witness he had money of Wiseman's. Would not have supplied the goods without Frame's guarantee. On the 6th August he wrote to Frame requesting payment; Frame replied repudiating the guarantee. Subsequently witness saw Frame and asked him what he meant. Frame replied, "It will be all right, it will be paid," and repeated this on a further occasion. Did not attempt to worry Wiseman.

Cross-examined: He looked to Frame for settlement in the first instance, and not to Wiseman at all. Frame rather expressed sympathy with witness in the matter. Witness would not be held responsible by Mr. Markham.

Mr. Henry William Markham said that he had a conversation with Frame, who said he had nothing to do with it. Witness replied that if all he heard was true, Frame would have to pay, and that it would put Mr. Day and Mr. Abbott in a serious position if what they had stated was not true as to the guarantee.

Cross-examined: Believed it was with the best intention that Frame brought Wiseman to his firm. Had tried to get the case settled without coming into court.

Alexander K. Frame, the defendant, deposed that he was a broker and commission agent. In June last year he was in partnership with Mr. Myburgh. He introduced Wiseman to a dozen different firms in town but always mentioned to those firms that Wiseman would be guaranteed by Mr. Bekker, of Sturk & Co. Also mentioned to Mr. Day at Markham's, that Bekker would be his guarantor if required. Witness acted as agent for Wiseman, from whom he received amounts at different times and paid his accounts for him. Wiseman traded up-country, and on this occasion he wanted some waterproofs. Witness took him to Markham's and supposed Wiseman would pay cash. However, Wiseman asked for thirty days' credit, and Day took witness aside and asked him if it was good enough. Witness told Day he had better go to Mr. Bekker, who had guaranteed Wiseman to other firms; and then Day said to Wiseman that if what witness said was true he should have the goods. Witness himself believed in Wiseman on account of Mr. Bekker backing him up. It was not his custom ever to guarantee people. Received the money from Wiseman with which to pay the first account. Received the exact amount from Wiseman beforehand. (Account-books produced.) He never received the benefit of the 2½ discount. Wiseman handed him the exact amount, which he in turn paid Markham. Some time after the first transaction Day asked him about Wiseman, and witness replied he thought he was good enough for about £20. He denied that Day ever asked him to guarantee Wiseman's account. He refused to guarantee Wiseman to the firm Gourlay, in Strand-street, at that very time. It was against his practice to guarantee. It was only on the 14th August that he was first made aware that Markham held him responsible.

Cross-examined: Wiseman left Cape Town at the commencement of July, taking a lot of goods with him from different firms. When he disappeared he owed witness about £10. Wiseman had thoroughly deceived both witness and Mr. Bekker. It was about the middle of August

that he heard that Wiseman had decamped. On several occasions he saw Mr. Bekker and inquired about Wiseman's position. That was because he was having many transactions with Wiseman. Never received any invoices from Markham for goods supplied to Wiseman. Would swear he never saw the ledger as stated by Mr. Day. (Witness was examined at length on entries appearing in his books showing transactions with Wiseman.) Wiseman always paid his accounts through witness.

Re-examined: Wiseman had just returned from up-country, and gave witness a memorandum of amounts owing by him to different firms, with the money, and witness paid them. There were many other accounts in the same position as Markham's, but no other firms had tried to hold him responsible. If he had guaranteed at all, it would have been as a member of the firm of Frame & Myburgh.

Peter Myburgh deposed that in June last he was a partner with Frame. The firm never received any invoices from Markham for goods supplied to Wiseman. If they were addressed to Mr. Frame, witness would not open the envelope.

Mr. Jones, for the defendant, relied on *Korstor v. Blake* (3 Sheil, 27); *Wood Bros. v. Gardner* (5 E.D.C., 189), and *Potier on Obligations* (section 401.)

The Court gave judgment for plaintiff with costs.

The Chief Justice said: Mr. Jones has very properly contended that the onus of proving a guarantee lies wholly upon the plaintiff, and that unless he satisfied the Court that his witnesses properly understood the contract to be one of guarantee, and that the defendant also so understood it, he is not entitled to succeed. Now in this case two witnesses are called on behalf of the plaintiff, Day and Abbott, who swear positively, not to one conversation but to several conversations, and they go into minute details as to the nature of the conversations between them and the defendant. Now if their statements are not correct they must be perjuring themselves, because they give minute details, and if they are correct there can be no doubt whatever that the intention of the defendant was to give a guarantee for the goods sold by the plaintiff to Wiseman. The evidence is that on the first occasion, the 12th June, the defendant introduced Wiseman to Day; Day refused to supply, saying he did not wish to open any new accounts, whereupon the defendant said he would guarantee payment, and it was only on this Day consented to deliver the goods. Both witnesses say also that it was arranged that every transaction

should in the first instance be mentioned to Frame, and guaranteed by him; there was to be no general guarantee authorising Wiseman to buy from Markham. On the first occasion Wiseman was supplied, and before the due date, on the 22nd June, the goods were paid for. I did not quite comprehend the evidence of Mr. Frame on this point, but I understood from him that Wiseman must have calculated the discount by himself, and without first going to the plaintiff, had ascertained the amount actually due, but in cross-examination it appears that Wiseman had first been to the plaintiff, and there ascertained the amount, afterwards going to the defendant and asking him to pay it. Now this, on the face of it, appears to be a most unlikely proceeding. Then it is said that on the 26th June Day came to consult the defendant again for the purpose of ascertaining whether Wiseman was still good, but Wiseman had only a few days before paid his account, so I do not understand why just after receiving the money from Wiseman, Day should again go to the defendant for the purpose of ascertaining whether he was good. But Day says that he went for the purpose of ascertaining whether Frame would still guarantee the second purchase by Wiseman. Well, as to the second purchase, we have the evidence of Mr. Day alone, but as to the third purchase, we have the evidence of both Day and Abbott. Day did not hear all the conversation, but one important matter that came out is that after the defendant had seen the amount of the goods, he said, "Very well; let him have these goods, but no more." Now, why should he say, "Do not let him have any more" unless he was responsible. His interest, as well as that of the plaintiff, was that Wiseman should be supplied, and it could only be owing to a guarantee existing that he said he might have those goods but no more. It was quite clear that at that time the defendant had the fullest confidence in Wiseman, he was in intimate business relations with him and believed Wiseman would pay the money. So long as the amount was small, I am of opinion that he had no objection, although it was not part of his business as a broker to guarantee these small amounts; he was certain that they would be paid by Wiseman, and it seems to one such a probable thing for him to say he would guarantee it. At all events, the plaintiff's evidence is quite consistent with all the probabilities of the case; the evidence of both witnesses was given in a very clear and distinct manner, whereas the evidence of the defendant was given in a very vague manner. He could

only recollect having vague conversations; but when it came to details, the defendant was entirely at sea. Well, under these circumstances, the clear proof that the Court always must insist upon in these cases is forthcoming, and judgment will be for the plaintiff with costs.

Mr. Justice Buchanan concurred with the judgment, and said it was only another case which showed the desirability of having written agreements in transactions of this kind.

[Plaintiff's Attorneys, Messrs. Trollip & Hutton; Defendant's Attorneys, Messrs. J. & H. Reid & Nephew.]

DOE V. BROWN. { 1895.
Feb. 22nd.

This was a cross appeal from a decision of the Resident Magistrate of Tulbagh, in an action in which the present appellant, plaintiff in the Court below, sued the respondent and defendant for the sum of £10 14s., being the cost of conveying 107 loads of stones at 2s. a load at Ceres-road at the special instance and request of the defendant, less £5 2s. 5d. for goods supplied by the defendant to the plaintiff.

The defendant admitted the debt of £10 14s., and filed a claim in reconvention for £10 15s. for goods sold; £9 10s. 5d. and £1 4s. 7d. due by one Koos Doe, which the plaintiff undertook to pay.

The Resident Magistrate gave absolution from the instance on both claims, and made no order as to costs.

From this judgment both sides appealed.

Mr. Juta, Q.C., for the original plaintiff.

Mr. Graham for defendant.

The Court allowed the plaintiff's appeal, and altered the judgment of the Magistrate to judgment for the plaintiff for £3 15s. 1d. with costs in the appellate Court and in the Court below. The defendant's appeal was dismissed.

[Plaintiff's Attorneys, Messrs. Findlay & Tait; Defendant's Attorney, G. Montgomery-Walker.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS (Chief Justice),
Mr. Justice BUCHANAN, and Mr. Justice
UPINGTON, K.C.M.G.]

REGINA V. KOCK.

{ 1895.
Feb. 25th.

Mr. Giddy applied for an order changing the venue in this case from the Supreme Court to the next Circuit Court to be held at Prince Albert.

Order granted.

TRUTER V. TRUTER.

{ 1895.
Feb. 25th.

This was an application to attach certain salary due to the defendant and at present in the hands of the Attorney-General's Department.

On the 15th February, 1895, the plaintiff obtained judgment against the defendant for the sum of £163 10s., less £36 10s. paid on account (due under a deed of separation executed between the plaintiff and her husband, the defendant), with leave to issue execution against all moneys standing to the defendant's credit in the Kimberley branch of the Standard Bank.

A writ was issued, but the only money to the credit of the defendant was the sum of £2.

The plaintiff now petitioned for an order allowing her to attach and issue execution against certain salary, about £80, belonging to the defendant in the hands of the Attorney-General's Department.

The Government offered no objection.

Mr. Sheil was heard in support of the application.

The Court granted the order as prayed.

HAUPTFLEISCH V. HAUPTFLEISCH. { 1895.
Feb. 25th.

This was an action for restitution of conjugal rights, failing which, for divorce on the grounds of the defendant's malicious desertion.

The declaration alleged that the parties were married on 22nd December, 1884, in community, that one child was born of the marriage, and that the desertion took place in November, 1894.

The defendant in her plea admitted her refusal to return to the plaintiff, alleged various acts of cruelty and ill-treatment on his part, and claimed in reconvention a decree of judicial separation and the custody of the child.

Mr. Benjamin for the plaintiff.

Mr. Molteno for the defendant.

Barbara Johanna Hauptfleisch, the defendant, deposed that she was a governess at Krukfontein when she was married to the plaintiff in December, 1884. For about a year she and her husband lived happily together, but from that time he began to ill-treat her. His mother advised him to beat her, and he did so. He hit her with his hand. This was by reason of disputes in which she would not give in. A child was born in November, 1885. Between 1885 and 1888 her husband did not beat her very frequently, but in 1888 she refused, for good reasons, conjugal relations with him, and he beat her with his fist. Her uncle, Peter Barnadus Marais, lived at Krukfontein, and she complained to him, and she and Marais went to Mr. Burton, the Resident Magistrate at Richmond. Mr. Burton gave certain advice, and she then consulted Mr. De Villiers, a law agent at Richmond. Soon after she again went to Richmond, when Mr. De Villiers asked her to withdraw the case. The result was that she forgave her husband, and they lived together again. He treated her well for about five months, but then began to ill-treat her again, pushing and pulling her about. The "Kerkraad" tried to bring about amicable relations, but failed. In 1892 his conduct became worse. In March of that year he punished the child with an ox-reim. She interfered, and he then struck her intentionally with the reim two or three times. She complained to her husband's cousin, about a week afterwards, and she showed certain witnesses the marks. She left the farm and went to Krukfontein, but after four or five days returned to her husband. He treated her well for two months, but then threw stones at her. She would not give him a key, and he dragged her about the house and struck her in trying to get it. She was badly hurt in the side and breast. The next day she saw a doctor at Richmond. She was ill at the time. She was afraid now to live with her husband.

Cross-examined: Did not remember telling her husband on the marriage day that she regretted having married him. She was a woman of quick temper. She would not travel with her husband, saying that she was tired of trekking about with him. Did not want to live at the place he proposed. When the child was being beaten by his father, she knew her husband said that it was because he had told untruths. She, however, interfered, and they had a violent quarrel. In the heat of the quarrel he gave her three blows. Did not remember threatening to stab him, nor did she ever throw large stones at him. Her husband had asked her to go back to him, but she refused, and she still refused. Would

not believe in his promises of kindness any more. She had left him on two occasions and went to step with her uncle, Piet Marais. Knew her husband objected to her going to Piet Marais' house, but she went in spite of this, and remained there for two days. Was at present living with her uncle, Piet Marais.

Re-examined : Her husband had now broken up the home and sold all the things.

Peter Odendal, a farmer residing at Kruysfontein, district Hanover, deposed that he was one of those to whom Mrs. Hauptfleisch showed the ox-reim marks, in her husband's presence, in 1892. Her arm was bruised.

Ernest Jacobus Marais, son of Piet Marais, gave similar evidence.

Petrus Bernhardus Marais deposed that he lived at Kruysfontein, and was uncle to Mrs. Hauptfleisch. He was seventy-eight years of age. She came to him complaining, and he helped her to get legal advice.

Cross-examined : Mrs. Hauptfleisch had visited his farm, since her marriage, several times. Was not aware that Mr. Hauptfleisch objected. About ten years ago he was charged with being the father of an illegitimate child. He was not guilty, but he paid £100. Did not know Mr. Hauptfleisch objected on account of this to his wife visiting the farm.

Anna Elizabeth Marais, wife of Ernest Marais, deposed that she saw Hauptfleisch beating his wife, who was bruised very much. Mrs. Hauptfleisch was always a sickly woman.

Cross-examined : Mrs. Hauptfleisch was at present living with her at the farm. At the time of the assault she was struggling to get away, while he insisted on putting her into a cart.

Dr. Krige, of Richmond, said he had known Mrs. Hauptfleisch for about five years. She was a delicate woman with hysterical symptoms. She once came to him complaining, and he found she had several bruises on the breast and one on the side. She had been very roughly handled.

Cross-examined : The bruises might have been caused by her own struggles.

George Stephanus Hauptfleisch said that on the afternoon of the wedding day his wife said she looked upon him with revulsion. Witness proceeded to explain in detail the reason of the quarrels between his wife and himself. She had an ungovernable temper. Refused to go with him to live at a certain farm, but not on any specific grounds. On the occasion of his punishing the child for telling an untruth, she interfered, and he struck her. She was very frequently violent, and on one occasion threatened to stab him. He was now perfectly willing to

take her back, and had a home for her. Whenever they quarrelled she always went to Piet Marais, and he usually had to fetch her back. He objected to her going to Piet Marais on account of his having had to pay £100 in respect of a certain charge brought against him. There was only the one child of the marriage, and he was nine years of age.

Cross-examined : Offered that morning, if the case was not brought into court, to enter into a judicial separation with his wife, and give her the custody of the child and to pay costs to date out of the joint estate of himself and wife. He went straight to her solicitors with this offer and was told to send the offer through his own solicitors. He would, however, rather take her back. He wanted the custody of the child, and was able to support and educate him. Had sold everything up and inserted a notice in the "Richmond Era." The Kerkraad had approached him with the object of bringing about better relations. His wife was a weak woman, but not very delicate. Had heard the doctor's evidence. Admitted it was not a proper thing to strike her with an ox reim, and was sorry for it. Denied that he struck her since, or that he ever said he had a right to do so. Mrs. Marais did not tell him that his wife was ill just previous to his striking her. Had sold up everything. There were ten oxen which his father had bought for £2 each. Had got no stock left, except a few sheep. He was now riding a Scotch cart at Richmond, and was making 2s. a day. He undertook now that if his wife returned to him he would treat her kindly and never strike her again under any provocation.

By the Court : Considered the joint estate to be worth about £130. Would rather live with his wife than be separated.

Johannes Pretorius, special constable at Richmond, deposed that he was very intimate with the parties, but had never seen Mr. Hauptfleisch ill-treat his wife. Saw Mrs. Hauptfleisch throwing stones at her husband. She had a very short temper. He was married to Mrs. Hauptfleisch's sister.

Mr. Molteno was heard for the defendant.

The Chief Justice said : In this case there are faults of temper on both sides. I am quite satisfied that if the defendant had always been a kind wife to the plaintiff those scenes of which we have heard to-day would never have occurred, and I think she is greatly to blame for everything that took place. The plaintiff, no doubt, occasionally lost his temper, and did what no husband has a right to do. He did strike his wife, but not with such violence as to justify the Court, after such provocation, in refusing him the relief he prays for, but I think

it is far better for these people that they should be apart. The child had better remain with the mother until he is sixteen years of age. Of course she will have the option of returning to her husband. The Court grants a decree for restitution of conjugal rights, with costs out of the joint estate; the defendant to return to the plaintiff on or before the 31st March, failing which the Court will grant a rule *nisi* to show cause on the 13th April why a decree of divorce should not be granted. The plaintiff to have the custody of the child from the time he reaches the age of sixteen, and to contribute 30s. per month towards the maintenance of the child, who will in the meantime remain in the custody of the mother. The plaintiff to have access to the child at all reasonable times and places.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

BURNS V. TOWN COUNCIL OF CAPE TOWN. 1895.
Feb. 25th.
" 27th.
" 28th.

Building contract—Termination—Justification.

This was an action instituted by Arthur Rayner Burns, a contractor, against the Town Council of Cape Town. The declaration alleged that on 13th November, 1893, the plaintiff entered into a certain contract in writing with the defendants whereby he undertook to erect a certain engine-house and chimney for electric lighting purposes according to certain plans and specifications (annexed to the declaration).

The said works to be completed by the plaintiff within the period of 190 days from the date of signing the contract, and in consideration of plaintiff erecting the works the defendants undertook to pay him the sum of £3,814. Thereafter on or about 14th November, 1893, the plaintiff entered upon the works in accordance with the terms of the contract, and duly proceeded to perform his work under the contract.

The plaintiff was unable, notwithstanding due diligence, to complete the works within the time specified in the contract owing to the action of the defendants in failing to supply certain material as agreed upon by them in the contract and in ordering certain additional works to be performed in connection with the erection of the house and chimney. On or about 7th July, 1894, the defendants wrongfully and unlawfully refused the plaintiff permission to complete the works and wholly, and finally, and

wrongfully prevented and discharged the plaintiff from completing the same, and wrongfully took possession of the plant and tools of trade belonging to the plaintiff, which said plant and tools of trade the defendants have refused to deliver to the plaintiff.

On the 7th July, 1894, there was due to the plaintiff by the defendants for work and labour performed and material supplied the sum of £1,148 1s. 7d., which sum or any portion thereof the defendants refuse to pay to the plaintiff.

The plaintiff said that by reason of the above-mentioned wrongful and unlawful acts of the defendants he had lost large profits which he would have acquired by the execution of the works and had sustained damage in the sum of £1,500.

The plaintiff claimed :

(a) An order compelling the defendants to deliver up to him his plant and tools of trade, or their value, £126.

(b) Judgment in the sum of £1,148 7s., being the amount due to him as per account annexed to the declaration.

(c) £1,500 damages for breach of contract.

(d) Costs of suit.

The defendants, after admitting the formal allegations in the declaration, specially denied that the plaintiff used due diligence, and that he was unable owing to the delay in the supply of granite, or to the ordering of additional works, so to complete his contract, and they said that the delay was occasioned by the plaintiff's negligence and default.

They said that albeit a reasonable time in the judgment of the defendants' engineer, to wit, from 21st May, 1894, to the 7th July, 1894, was allowed to the plaintiff yet he did not proceed with the work in a manner satisfactory to the engineer, nor did he exercise such due diligence or make such progress as would enable the works in the opinion of the engineer to be efficiently completed in the time specified, or in such reasonable extra time as was so allowed him, but did wholly fail and come into default in the performance of the works in terms of the contract, plans, conditions and specifications, whereupon, and only after frequent complaints and remonstrances, on 7th July, 1894, the engineer did, pursuant to the power conferred by paragraph (a) of the 16th general condition of the contract, on behalf of the plaintiff, lawfully enter upon the work, and take possession of and use the plant and materials belonging to the contractor, and prosecute the work departmentally in manner therein provided, but at great additional cost and expense to the defendants over and above the contract price, whereby in terms of the said condi-

tion any money then due to the contractor in respect of such work as he had done and not yet been paid for, as well as the said plant and material, became and are the absolute property of the defendants, who remain heavy losers by the negligence and default of the plaintiff. They admitted that they refused to pay any sum of money or deliver any of the plant or material to the plaintiff.

The replication joined issue.

Mr. Rose Innes, Q.C., and Mr. Graham for plaintiff.

Mr. Juta, Q.C., and Mr. Webber for defendants.

Arthur Rayner Burns, the plaintiff, deposed that he was a contractor residing in Cape Town. He tendered to do the work in question for £3,814, and the tender was duly accepted. All the necessary conditions and documents were duly signed, and he started the work on the 14th November, 1893. Shortly after he commenced certain alterations were made by the Council in the working plans. In December and January work was actively carried on. On the 9th January, 1894, the assistant engineer of the Council complained of the slow progress, and on the 30th January Mr. Cairncross again complained. He (witness) explained that he was getting on with the work as fast as was possible. There was a difficulty about the carting, and it was not every team that could get up the hill with the loads of stone that were being used. The Council had to deliver dressed granite to him at the works for the foundations. On the 22nd January he had finished the concrete foundation, and was ready for the granite, but it had not been delivered by the Council; the corner-stones were not there. Mr. Cameron was clerk of the works, and he consented to witness's proposal that in order to avoid loss and delay he should use brick piers pending the arrival of the corner-stones. The workmen were almost idle for several days, waiting for the granite, the last block of which arrived on the 6th February. Even when it arrived the granite was not properly dressed, and witness had to get his own workmen to dress it. Other material for the chimney, to be supplied by the Council, was not delivered until the 19th April, whereas the whole contract was to have been finished by the 20th May. A certain flue was shown in the original plan. These plans had to be deviated from, as no provision had been made for excavations for the flue. The plans for these alterations had to come from Germany, and pending their arrival the work was carried on at great disadvantage. Received the provisional plan on the 14th March showing the

excavation, and then they began to cut away the concrete foundation accordingly. The excavating for the flue was finished on the 4th April, when the building of the flue was commenced. The Council had to supply the fire-bricks, but they were not delivered faced as they should have been. The Clerk of the Works insisted on their not only being faced, but rubbed smooth, even those that were to go out of sight. This was an expensive and slow operation. Pieces of granite for the flue were not supplied in time by the Council, and there was delay of five or six days. The arch of the main wall was thus delayed, and after the arch was up work went on, and by the end of March they were ready for the roof. In February the Town Engineer wrote on the subject of the chimney. Granite for the base of the chimney was not supplied by the Council until the 20th April, and even then it was not according to the plan. It was three times the size it ought to have been, and he had to have a special stage erected to receive it. For the engine beds he had to make large excavations, and these were not on the original plan. It was only about the beginning of June that he first received instructions about the engine beds. These excavations were pushed forward as rapidly as possible. When the walls of the engine house, about the end of May, were roof high, stone for coping was not delivered by the Council. The Council's engineer told him to get the stone himself from Kalk Bay, and it was on the way when he was stopped working. Certain door frames were altered by the Council no less than five times. For the chimney witness had to build with his own bricks to the height of 15 feet, and thereafter the Council were to supply the bricks. He found it impossible to get bricks to satisfy the clerk of the works, and it was agreed that they should use Hare's bricks, and it was then found that they could not be procured. He had correspondence with Mr. Cairncross, which resulted in witness landing 10,000 of Caporn's bricks at the works. These were all condemned by the clerk of the works, who said that Mr. Cairncross should never have consented to the alteration without consulting him. Correspondence took place between Mr. Cairncross and himself regarding the slow progress of the work. He replied that he was getting on with the works as fast as possible, but that he was being interfered with in every possible way by the clerk of the works. The Mayor went to inspect the works, and witness was about to explain the difficulties he had with the clerk of the works when Mr. Cairncross stopped him

On the 7th July he was ousted from the control over the works, and the Council, he believed, proceeded to do the work departmentally. He reckoned that, supposing the Council furnished all the material properly and there were no further alterations, he would have finished the whole work in another twelve weeks. He calculated it would have cost him £1,000 to finish the whole of the work. He had received from the Council £1,773 1s. 11d. He did not commence plastering because of the alterations from the original plans and other reasons. He had seen the works since he was ousted. They were not completed even yet, and fewer men were being employed by the Council than were employed by witness. He wrote to the Council four weeks after he was ousted, pointing out that money did not appear to be any object with the Council, judging by the manner in which they were proceeding with the work, and stating that he hoped he would not be held responsible. He also wrote stating he heard that the Council contemplated accepting a tender for the plastering for £700 from the same man (Mr. Pipes), who had previously tendered to him to do it for £450. In short, he protested against the wasteful way in which the Council were completing the work. He had suffered great loss by the action of the Council. They had taken away his plant, and he had spent between £600 and £700 of his own money over and above the £1,773 received from the Council. He was now without a penny, and had no plant, so he could not enter into any contract.

Cross-examined by Mr. Juta, Q.C.: He had made a schedule in which he valued the work he had done on the engine-house at £1,864 10s. He was asked by the Council to send in a schedule valuing the work he had done, so as to enable the engineer to measure up his work and pay him. The Council wanted to know how he arrived at his tender, and he sent them the particulars (document produced). The Council objected to his first schedule and he sent in another. The tender was in two parts, for the chimney and the engine-room. The only thing that connected the two was the fine. (Witness was examined at length regarding the differences in prices submitted by him in the four schedules to the Council). He devoted all the money he received from the Council to the work, and about £600 to £700 of his own as well. Robertson's had supplied cement to the amount of £51. They did not ask him for the money, because they knew he did not have it. Did not know that the Town Council had paid it. The Council guaranteed his accounts with Arderne and Lithman. The

Council had to supply him with bricks for the chimney when it had reached a certain height, but he bought 4,300 bricks for the basement part. For those bricks the Council charged him twice over. The clerk of the works condemned Caporn's bricks. He had arranged with Caporn's when tendering for the supply of these bricks that they were to be approved of by the engineer. On these being condemned, it was agreed to substitute Hare's bricks. Caporn did not refuse to supply bricks because he (witness) could not pay for them. As a matter of fact, the clerk of the works and himself went to Caporn's, but could not get any bricks. Therefore they went to Brown's and got bricks, but Brown subsequently offended the clerk of the works, who wanted to condemn the bricks, but witness said they would have to stick to Brown. One of his principal grievances against the Council was their delay in delivering the granite. They had to use Kalk Bay stone and brick coping instead of granite, because the granite was not delivered in time. This substitution delayed him. He could not go on with the brick work until the Kalk Bay stone was delivered. The boiler beds were an "extra," and delayed him in the general work. The boiler flues delayed the building of the walls. The alteration of the flue in the plan was a fundamental one. Started first laying bricks for the flue on the 4th April. He was paid on actual measurement taken of the work done. The bricks had to be cut and fitted by the contractor, but that did not mean the amount of cutting and fitting he had been obliged to do. They should have been delivered by the Council moulded to shape. The non-delivery by the Council of the granite for the corner-stones greatly delayed the work and caused much inconvenience. Witness deposited a sample of brick which the clerk of the works would not pass. It was not a fact that the reason why the bricks were not supplied by Caporn was that he (witness) could not pay for them. He estimated the stone work in a lump sum at £60. He did not remember how many cubic yards there were. He gave one estimate at £60 and another at £100. He had never worked any of the mountain stone work before. He had not commenced to dress the mountain stone. Mr. Wignall told him not to get it. He ordered the doors and windows from Mr. Lithman. They were to cost over £200. Some of the roof work was included; it would be about £25. He allowed £316 for plastering, and could have done it for £310. The lowest tender was £559. The plastering might have been altered when the man tendered. Messrs. Arderne & Co. were

keeping wood for him. Witness asked the Council for a guarantee for this wood on the 1st April. He was not ready for fixing the wood on that date. On May 8 the City Engineer wrote complaining of the work not being carried out according to specification. Subsequent letters were also received by witness as to faulty wood and as to delay in erection of the chimney. He had had experience of contracts in this country before.

Re-examined by Mr. Rose-Innes, Q.C.: Witness had the contract for the new street wall when he had some dispute with Mr. Wignall; and that dispute had continued through the present contract. He asked Arderne & Co. to hold over the wood, and the reason he asked for the guarantee for the wood was that he only got his money from the Council by "drips and drabs." The last week's payment was barely sufficient for wages, to say nothing of material. Witness was told by Mr. Wignall not to get the mountain stone; and brick and plaster were afterwards substituted. The face bricks proved to be the difficulty, as the clerk of works wanted them to be all exactly the same size. He could not manage this, as he purchased 38,000, and could not get 5,000 exactly alike out of them. The bricks were, however, up to sample. The engine-house and chimney, according to the amended plan, could not be separately completed, because of the angle in the new flue. The fire bricks were part of the extra work for the new flues. There was continual friction on the part of the clerk of works. The delay caused by the new flue could have been got over by building an arch. He suggested this to the clerk of the works, but the clerk said, "Get out, you fool, don't be talking nonsense." Witness had several interviews with the Mayor and the Public Works Committee. At the meeting on the 5th July he heard the Mayor speak in his favour. Mr. Cairncross afterwards came out and said witness would not be required that day. On the 7th July he received the letter before referred to, dismissing witness from the contract.

Alfred George Gray, builder, deposed that he had had great experience in taking out quantities. He had been twelve months with Mr. Charles Freeman; had had experience in Australia, and had had contracts himself. He had several times viewed the works in dispute. He would not have racked the walls back, but would have thrown an arch over, so that the work might not be delayed. He had gone through the work done by Mr. Burns, and the statement produced was correct. The value of the masons' work done was £2,660. This did not

include the carpenters' work. It would cost £160 to complete the chimney from where plaintiff left it.

Cross-examined by Mr. Juta, Q.C.: He had no experience of mountain-stone work; but he calculated it at 10s. a foot. This would be £13 10s. a cubic yard. The £160 he allowed was for labour only; the bricks were to be supplied by the Council.

James Roberts, bricklayer, deposed that he had worked four months for plaintiff. He left the latter end of June. Witness worked on the new flues. He began on them early in April. The concrete at the bottom of the excavation had been completed. The two flues were each about three feet wide; there was only room for one man to work in each flue, and it was tedious work. It was not necessary to cut and shape the bricks as directed by the clerk of the works. If the bricks had not been cut and shaped, the same work it took five weeks to do could have been done in one week. There was a delay of five or six days waiting for a piece of granite. As soon as the flues arrived at the junction, more men were put on. Witness only saw Mr. Cairncross once whilst he was working there.

Cross-examined by Mr. Juta, Q.C.: Witness denied that Mr. Cairncross had ever complained to him of delay. They could not begin at the junction of the flues without the granite. The flue work could not be built until the granite was in. They worked as far as they could. Other men had not had to leave the work for want of bricks. Two men cut the bricks, and as the bricks were cut they had to be set; so that no more than two men could work.

Harry Hobson, bricklayer, deposed that he had been employed on the works in dispute. He continued working there from March, 1894, until last week, when he left of his own accord. Witness saw the state of things as to the flues. An arch could have been put in instead of racking the walls back. The work in the flues was very slow and expensive. Some of the work was unnecessary and ridiculous; there was a lot of labour that was not required. After the plaintiff left in July the number of bricklayers was decreased. They had been stopped for want of bricks since plaintiff left, but not in plaintiff's time.

Cross-examined by Mr. Juta, Q.C.: The alteration in the flue did not cause the bricklayers to lose time. There was no stone on the works when plaintiff left.

Francis Clark, carpenter, deposed that he worked on the building, beginning shortly before the plaintiff left. Witness was employed on

the roof, and went on working two or three months after plaintiff left. There were twelve carpenters employed when plaintiff left, and that was a sufficient number for the work to be done. When the Town Council took over the work there were only nine.

Cross-examined by Mr. Juta, Q.C.: They were never stopped for want of timber in plaintiff's time.

George Mann, stonecutter, deposed that he was employed by the Town Council in February, 1894, to dress stone for the building in question. Sometimes he was at the works and sometimes at the quarry. Witness heard what plaintiff said when he proposed that an arch should be built, but did not hear the clerk of works reply. This was in May, and about this time he was dressing stone for the base of the chimney.

Harry Wildman, stonecutter, deposed that he had worked at the engine-house, setting granite for Mr. Burns. They had to cut some granite because it had been sent down unprepared. It was several days before the corner stones were sent, and this caused delay.

John Henry Hoare, bricklayer, deposed that he had worked for plaintiff about three months on the electric light building. They were never delayed for want of bricks. He thought there were too many men working in the flues. They had been stopped for want of granite. They could have gone on with the flues if they had put in an arch.

Cross-examined by Mr. Juta, Q.C.: The building was stopped because of the flues. Two walls were not up in the middle of March. When he was not working on the flues he was working on the walls. It was not customary to build one wall at a time.

Frederick Edward Mittens, labourer, deposed that he was employed on the inside excavations of the building for the engine beds. One excavation was 8 feet, the other 2 feet deep. The clerk of the works stopped the excavation. Eight men were working there, and they were discharged. Witness was taken on again by the Town Council.

Robert Thomas Marks, foreman of works, deposed that he had occasionally visited the works in dispute. The labour required to finish the brick and stone work was according to his estimate—£160. The bricks supplied by the Town Council were not moulded bricks.

This closed the evidence for the plaintiff.

Walter Read, chief draughtsman in the office of the City Engineer (examined by Mr. Juta, Q.C.), deposed that he calculated the quantities for the works. Burns submitted his first schedule of quantities, that worked out about £500 more than the contract price. This would

have meant that Burns would have been paid before he completed the work. The last schedule submitted by Burns worked out all right. The Council guaranteed Burns's account with people from whom he obtained supplies, and had accordingly paid Lithman £80. The plans were prepared under witness's charge. The plan for the flue was given to Burns on the 6th March. One plan for the engine bed in March, and another in April. The granite was delivered on the 19th April. Photographs had been taken of the works at various times, showing the progress of the works, and on which Burns was paid his instalments.

In reply to the Court, Mr. Juta said that there was a balance due to Burns when he was ousted, but the balance was now in favour of the Council, because the Council had exceeded the contract price in themselves finishing the works.

Examination continued: Burns only built 11 feet of the chimney (from the ground) in the eighty days or thereabouts that he could have gone on with it. The total height of the chimney was to be 115 feet. Could not say if Burns could not go on with the chimney until the flue was finished. The cost of finishing the chimney (from the stage Burns left it) worked out to £422 according to Burns's own figures in the contract. Could not say how much it actually cost the Council to finish it; but according to the specifications prepared by witness, the cost of finishing worked out at £865. Burns could not possibly have finished the chimney, therefore, at his contract price.

Cross-examined by Mr. Innes: Burns only allowed £100 for mounting stone to finish the chimney, whereas according to the specification and plan the stone, at 9s. per foot, would come out at over £500. Referring to Burns's schedule which would have involved his being paid too soon, this would be subject to the 25 per cent. always retained by the Council. Did not know if the granite had been all delivered by the 19th April. Did not say so in examination in chief. Cameron, the clerk of works, always measured up the work. Did not verify Cameron's figures, but took them as being correct in making out the plans showing where Burns was at different times, but on the 7th July, when Burns was turned off, his subordinate measured and found Cameron's figures correct.

Arthur Ambrose William Carpenter deposed that he was subordinate to Read in the draughtsman's department. Witness made the plans showing Burns's progress from Cameron's measurements, but on the 3rd July he was sent by Cairncross to measure up, and he found Cameron's measurements were correct.

Cross-examined: Did not mean that he was able to check Cameron's figures. Actually did not know if they were correct or not.

Re-examined: Meant that the plans he made from his measurements corresponded more or less with those made from Cameron's measurements.

Thomas Wilson Cairncross deposed that he was the City Engineer and a member of the Institute. The tenders were separate, one for the building and one for the chimney. The two works were distinct, and the subsequent alteration of the flue to the chimney did not involve delay to the buildings. The two works still were distinct. The proper thing to do would have been to leave the flue till the last. Burns's tender for the chimney was £1,047, lower by £400 than any other tender. A list of prices, in accordance with custom, had to be submitted by Burns. The Council had had to pay £51 odd to Robertson's for cement supplied to Burns. This was paid after Burns was turned off. They took the cement over from Burns and paid Robertson for it. Did not tell Burns they had done so. Visited the works very frequently. Burns was not correct in saying that he was not there more than once or twice. Regarding the bricks, the original sample was obtained from Caporn, who had supplied bricks of the same quality to the Council, without failure, for drainage purposes. Burns ought not to have had difficulty in getting the bricks, but he could not get them, and subsequently witness approved of a sample submitted in substitution by Burns. The bricks supplied to this latter sample were condemned by witness. Sent several people to the brickmakers with the object of helping Burns to obtain bricks. Burns had to use his own bricks up to a certain height. Had not attained that height when he was turned off, but the Council supplied him with bricks for the base so as to avoid delay.

By the Court: 228 stones had to be supplied by the Council for the building, and all but the corner stones were delivered by the 6th January. The corner stones were supplied on the 27th February. Burns could easily have gone on without the corner stones. Granite for the chimney was supplied to Burns by the time he was ready to use it. It was lying on the works for a month, and Burns did not touch it. The work was practically stopped for a month. Granite for the chimney was delivered between the 12th and 18th April. Burns could have had it earlier if he had been ready for it. He was not nearly ready with his brickwork on which to place the granite. Burns's plant was about the most inferior plant witness had ever seen on works of such a nature. The

excavation inside the building for the boiler foundations could not interfere with the progress of the building in any shape or form. They could have given this extra excavating work to anybody else, but they decided to give it to Burns. The excavations went to a greater depth than the foundation, but that would not retard the building. The excavation was more than two feet away from the foundation. The flue should not in any way have interfered with the progress of the work. If Burns had carried out his contract properly he would have been above the flue before the flue was decided on; but as he was so low down with the building arrangements were made accordingly, and Burns was asked to wait for a couple of days, so that the flue could be worked in. During that short delay Burns might easily have employed all his men on another part of the works. Burns neglected his work from the start. Witness complained early in January of his slow progress. The photograph (produced) of the flue must have been taken in March. That photograph showed that Burns had not even begun the brickwork on which the granite was to have gone. The whole chimney ought to have been finished in March. It was 100 days of the contract time. Burns sent the Council a letter on the 3rd February complaining of delay in delivery of the granite. I never heard until the previous day in court that Burns was delayed in the flue through non-delivery of granite. The chimney could have been constructed independently of the flue altogether. Regarding the coping granite for the building, it was agreed to substitute brickwork for it. Before any stone whatever could have been required certain brickwork had to be done, and Burns had 2 feet more of this brickwork to do when turned off on the 7th July. Therefore could not have been delayed by non-delivery of stone for the coping. No stone had come from Kalk Bay. The Council had the stone in stock which they used. Witness had drawn up an account showing the expenditure of the Council since they took over the works. Called for tenders for the important items. The Council got a discount off materials that Burns would not get. Also the Council imported its own cement, and Burns got the advantage of that. The account showing the state of affairs on 7th inst., showed that the Council up to then had had to expend £130 15s. 6d. more than Burns's contract price. He considered that the non-paying portion of Burns's contract was coming on when Burns was turned off. The lowest tender the Council received for the plastering was £559, whereas Burns only allowed £316 for this in his contract,

By the Court: It was admitted that the Council owed Burns the sum of £648 when he was turned off, but Lithman had since been paid £80, and Robertson £57, and the contract price had been exceeded, so that Burns on the 7th inst. owed the Council £130 15s. 6d. He admitted that the value of the work done by Burns was £2,500 odd, and that he had paid £1,800 odd, leaving the balance due to him on the 7th July of £648 11s. 10d. Could not say if the Council subsequently had to pay for some of the materials included in Burns's work, which was worth the £2,500 odd he had mentioned.

The Court requested Mr. Juta to furnish an account of what materials, actually used by the plaintiff, had to be subsequently paid for by the Council.

Examination continued: According to the expenditure of the Council since Burns was turned off, if Burns had been allowed to finish his contract he would have been a loser of the sum of £817.

Cross-examined by Mr. Innes: The schedule of prices submitted with the contract had to correspond nearly with the contract. It was a common occurrence with contractors to submit inaccurate schedules. The building was practically completed in November last. Witness made up an account up to the 7th instant showing Burns owed the Council £130, but it was not a complete account by any means. The plant taken over from Burns was not allowed for. The account was not meant as a joke. The Council had supplied more plant on its own account, and Burns was charged with this on the account although he was not credited with the plant taken from him. It was a fact that the same labourers were employed on other works contemporaneously with Burns's works by the Council, but they always charged Burns's works and the other works separately when labour was thus transferred. There were eight corner-stones required for the building, not six, as he had stated previously. Did not recollect any complaint being made of non-delivery of granite for the flue. Only heard it in court. He (witness) had stated that Chamberlain told him that Burns never ordered stone. (Letter was produced from Chamberlain to Burns apologising for the non-delivery of the stone). Witness thought that the chimney could have been finished in eighty days. Could not say how long the Council had taken to finish the chimney. Considered that under the contract the Council should have delivered the granite when Burns was ready. Granite for the chimney was not delivered till the 14th April,

for the sole reason that Burns was not ready for it. The stone was all properly dressed. The Council, however, had to pay a man in May to finish the dressing of two of the stones which were not delivered properly by the Council. This did not delay Burns at all. The alteration in the flue from the original plan made the flue an entirely different affair. Regarding the evidence of the workmen that the flue was a long and tedious job, he thought the workmen were too long over the work. From the 20th February to the 18th June sent no letters of complaint to Burns. Made a thorough inspection of the works more than once. Struck him there were too few men on the flues. Witness had the power under the contract to order that more men should be put on, but never did so. The responsibility of putting up an arch not on the plans, as Burns had to do, would be with the architect and not the builder. Witness had the power to order any deviation or extra from the plans. Witness would not take the responsibility of making the arch—he preferred Burns to take that. It would be better for Burns to build the flue first before proceeding with the chimney. The plan for the engine beds was given in April, but those beds would not interfere with the building. It was true that the clerk of the works once stopped the excavation as being a danger to the buildings. With regard to the samples of bricks, all they wanted was a brick of the same quality. They did not care where the bricks came from. The clerk of the works (Cameron) condemned the bricks bought by Burns from Caporn. Burns then produced another sample, which witness approved of, but the clerk of the works condemned this lot again, because they were not up to sample. Caporn and Howard's bricks were supplied to the Council to finish the work, and they were satisfactory. The door frames were only altered once.

By the Court: There was about six days' delay in supplying granite for the foundation. Burns, however, could have gone on with other work in the meantime. When Burns left the work he had done £648 worth of work more than was paid for by the Council. The materials for which the Council since paid had been ordered by Burns, but not used.

John Robert Wignell, Assistant Engineer to the Town Council, deposed that he was almost daily on the works. He was practically in full charge of the building. Agreed with Mr. Cairncross that the engine bed excavations had nothing whatever to do with the building. Burns carried on the works very badly. Had not enough plant.

By the Court: Agreed with the whole of Mr. Cairncross's evidence, with the exception of one or two minor points.

Examination continued: All the granite was delivered by the 19th April, and Burns was not ready for it till about twelve or fourteen days afterwards.

Cross-examined: Plaintiff was only delayed six days altogether by the Council. The alteration of the flue and the engine-beds were also delayed. Gave Burns the order to make the engine-bed actually after the original contract time had expired. Had not made any calculation as to what delay was occasioned by Burns not having bricks at hand.

Arthur Caporn, brickmaker, said that Burns came to him at about the time he made the contract and asked about 120,000 bricks, but gave no order. He could not get bricks to sample, because he made no preparations beforehand. Such bricks required long notice. Refused to supply bricks to Burns after 20th March. The reason was that Burns ordered 32,000 bricks; 10,000 were delivered and condemned by the clerk of the works. He fell out with Burns, and the latter never paid him.

Cross-examined: The clerk of the works was very exacting and strict. Even Mr. Byworth, the Town Clerk, told witness that the clerk of the works had no right to make a complaint he had made about certain bricks.

By the Court: If in November Burns had ordered all the bricks he wanted, he would have supplied them all in time for Burns.

Carl Eric Albon, of the firm of Lithman & Co., said there was a delay in the delivery of certain door frames or windows to Burns because they wanted payment or a guarantee.

David Cameron deposed that he was clerk of the works (of the Town Council) at the works. Had had considerable experience as a clerk of the works. Burns went about his work very badly, and was not a practical man. Witness assisted in laying out the works because Burns did not seem to be capable of doing it. Burns was short of bricks all through the job. Witness went to Caporn's several times to try and get bricks for Burns. Witness never prevented him from going on with the work. It was not true that he told Burns to stop doing any work until he finished the flue. When the granite was delivered Burns was not ready for it. It took six weeks to do the flue, but it might have been done in eighteen or twenty days. No more cutting of bricks was necessary because of the alteration in the construction of the flue. Reckoned Burns's plant to be worth £65 or £70. Some of it was returned to him—perhaps £18 worth.

Cross-examined: Would not say that Burns should not have taken on the job at all. Had rows with Burns but never threatened to assault him. Struck one of Burns's carpenters once. Had never struck any other man in his life. It all depended whom he was dealing with whether he was short-tempered or not. Burns should have gone about the flue differently. Witness did not suggest this to Burns as it was not his (witness's) business. Burns need not have stopped working on the building because of the flue.

Mr. Juta put in a rough account, amended to date, showing £146 was due to the Council from Burns.

Mr. Innes was heard for the plaintiff. Mr. Juta was not called upon.

Judgment was delivered for the defendants with costs.

The Chief Justice said: This case is only one of many in which persons, in their anxiety to obtain contracts, tender to do work for very much less than the true value of the work. In the present case it seems to me that the contract entered into between the plaintiff and defendants was a most one-sided contract. It is entirely in favour of the defendants. It gives them full power and control, and the power to enter on the works and take them entirely out of the hands of the contractor, in case he does not in the specified time, fulfil his contract. Now I quite agree with Mr. Innes that the grounds for exercising this power must be reasonable. Where the Town Council themselves order alterations or are guilty of some delay, such circumstances have to be considered and taken into consideration in reference to the time taken in completing the works, and I agree also with Mr. Innes that under such circumstances the City Engineer should not be the sole judge, but that it is for the Court afterwards, considering all the circumstances of the case, to see that a reasonable time was allowed to the contractor to fulfil his work, bearing in mind the alterations ordered and the causes of delay in the work. But I am perfectly satisfied in this case that neither the alterations nor the delay caused by the Council in any way caused the very long delay of which the contractor was guilty. The non-supply of the granite caused a delay, at the utmost, of only six days, but as to the flue, on which so much stress is laid by Mr. Innes, I am perfectly satisfied that the alteration need not have delayed the work for a single day. At all events it did not delay the work from the 7th May to the 7th July. The plaintiff himself did not take the ordinary precautions which might have been

expected from a contractor who contracts in so large a way. Mr. Caporn, from whom he got his bricks, says that if the plaintiff had ordered his bricks at the time he entered into the contract the bricks would have been available in ample time. But this the plaintiff did not do, but he entered upon the work and got his supplies in a hand-to-mouth manner, and Mr. Caporn having other customers to supply was not able to give the requisite number of bricks to supply Mr. Burns, and as a matter of fact the absence of the bricks had very much more to do with the delay of the work than anything else. Even after the granite had been delivered there was delay on the part of the contractor. Under these circumstances I am of opinion that the Town Council was justified on the 7th July in entering on the works. They had given the plaintiff notice of the delay in January, in February, and in May, and again in June, and on the 7th July they were justified in entering upon the works, and it also appears to me to have been the very best thing for the contractor himself. If the Town Council had not entered on the works, I am satisfied that the contractor would have been a heavy loser. Looking at the tenders I find the highest tender was £7,100. The plaintiff's tender was only £3,800. Well, if we take a fair average of the different tenders it would be about £5,000, and that is the amount the plaintiff ought to have tendered for the work to make any money out of his contract. But in his anxiety to get this contract, he tenders at an amount for which he could not possibly have performed the work. Even a man of means, with facilities for getting discounts and so on that the plaintiff did not have, would have been a loser, but the plaintiff unfortunately was without means, and consequently had a great many difficulties to contend with in carrying out the work. But that is his misfortune, and all the Court has to do is to consider the case on its merits. Under these circumstances, judgment must be for the defendants with costs. There is no claim in reconvention; had there been such a claim, it would have been a question of what the Town Council was entitled to recover from the plaintiff.

Mr. Justice Buchanan: I concur. The only doubt I had was whether the Town Council had reasonable cause for entering on the works on the 7th July, but after the explanation given by the Council's officers, I think the delay was attributable more to the impecuniosity of the plaintiff than to delay on the part of the Council.

Mr. Justice Uppington also concurred.

[Plaintiff's Attorneys, Messrs. Trollip & Hutton; Defendants' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPPINGTON, K.C.M.G.]

Re ROWE'S INSOLVENT ESTATE. { 1895.
Feb. 26th.

Mr. Sheil, on behalf of R. M. Ross & Co. and other creditors, moved for the appointment of a provisional trustee, with power to carry on the brick-making business formerly carried on by the insolvents, pending the election of a trustee.

The Court granted the order as prayed, and appointed Mr. Hazell provisional trustee with the powers asked for.

DICKSON V. DICKSON. { 1895.
Feb. 26th.

This was an action for restitution of conjugal rights, failing which for divorce, instituted by the plaintiff against his wife, on the grounds of her malicious desertion.

The declaration alleged that the parties were married on the 8th August, 1889, and that the desertion took place on 31st May, 1893.

Mr. Watermeyer appeared for the plaintiff.

The defendant was in default.

Spencer Dickson, the plaintiff, deposed that he was a salesman in Cape Town. Was married to the defendant on the 8th August, 1889. He and his wife were both under age at the time, and there was an agreement that his wife should remain with her mother until he was in a position to provide a home for her. For about ten or eleven months he called on her, but her mother then objected to any further calls. Her mother did not approve of his going out of an evening by himself, and his wife said he had better not call on her any more. He continued to meet his wife, but outside the house. Did not cohabit with his wife after marriage. Last saw her in December, 1891, and attempted a reconciliation, but, as before, she referred him to her mother. On the 31st May, he received a letter from his wife, saying she was leaving for England, did not intend to return, would never live with him, and that he would find certain presents in the cloak-room at the Cape

Town Station. Before he left for England he wrote to her several times, attempting to bring about a reconciliation, but without success.

The witness was questioned closely by the Chief Justice as to the reason of these strange relations, and it was elicited that there was a seduction before marriage, a child (now dead) being born on the 21st August, thirteen days after the marriage. His wife's father lived at Johannesburg at the time, and witness believed he was still there. The mother wished the marriage to be kept secret, and all the parties acted accordingly. He could give no further explanation of the mother's objection to his calls than that there was unpleasantness owing to his going out alone in the evenings.

The Chief Justice said: It is a strange case, but at the same time there is nothing before the Court to show that the plaintiff is not entitled, at all events, to compel his wife to come back to him. But there must be personal service of the order, and there must be a tender to the wife of the means whereby she can come back. If she has any grounds for refusing to come back, she will still have an opportunity of urging those grounds, and the plaintiff must be prepared with some further and more satisfactory evidence on the return day as to the grounds of his wife's refusal to cohabit with him. The Court now grants a decree of restitution of conjugal rights, the defendant to return to the plaintiff on or before the 15th April, failing which, a rule nisi will be granted calling on her to show cause on 1st May why a decree of divorce should not be granted, satisfactory evidence to be forthcoming on the return day that the plaintiff has offered to provide the necessary means to enable the defendant to return. Personal service to be effected.

[Plaintiff's Attorney, A. H. McLeod.]

SMUTS'S TRUSTEES V. VAN ZYL'S } 1895.
EXECUTORS. } Feb. 26th.

Receipts—Action to compel delivery.

This was an action to compel the defendants to render dividend receipts and pay £10 damages instituted by Emile H. van Noorden and Jan H. Zoer, in their capacity as trustees of the insolvent estate of Jacques Smuts, against Susannah E. van Zyl and Pieter M. G. van Zyl, in their capacity as executors testamentary of the estate of the late Gideon van Zyl, and also individually.

The declaration alleged that Jacques Smuts was at the date of his insolvency indebted amongst other debts in the sum of £800 under a bond originally for the sum of £1,400, passed in favour of the defendants as executors.

That the bond had before that date been ceded by the defendants as collateral security for the payment of a loan of £1,250 taken up by them, and the bond was proved as a debt of £800 against the insolvent estate.

The amounts of £32 3s. 4d. and £175 16s. 11d. were awarded by the plaintiffs, as trustees, to the defendants, as executors, as dividends in respect of the debt, and the accounts awarding the said sums to the defendants as executors were duly confirmed by the Supreme Court. The said amount of £32 3s. 4d. was duly credited with the knowledge and consent of both defendants in account between the first-named plaintiff and the estate of the late Gideon van Zyl, and the said amount of £175 16s. 11d. was likewise duly credited with the knowledge and consent of both defendants in account between the said plaintiff and the second-named defendant, the two defendants being the only persons interested in the said amounts under the will of the late Gideon van Zyl.

That the defendants wrongfully and unlawfully failed after lawful demand to make and render due receipts satisfactory to the Master in acknowledgment of the receipt of the said dividends from the plaintiffs, who have been called upon by the Master forthwith to file such due receipts, but by reason of the defendants' said default the plaintiffs have been and are unable to comply with the Master's demand.

The plaintiffs in their capacity claimed:

(a) An order compelling the defendants in their capacity forthwith to make and render due receipts or a due receipt for the said dividends of £32 3s. 4d. and £175 16s. 11d., or £208 0s. 3d.

(b) Judgment against the defendants jointly and severally *de bonis propriis* in the sum of £10 as and for damages.

(c) Other relief and costs *de bonis propriis*.

The defendants in their plea denied that the amount of £32 3s. 4d. was with their knowledge and consent credited in account between the first-named plaintiff and the estate, and they said that the said amount was still owing to them. They admitted that they were the only persons interested in the sums in question under the will of the late Gideon van Zyl. They did not admit that the amount of £175 16s. 11d. was credited as alleged.

They said that in or about 1890 the second-named defendant, acting with the full knowledge and consent of the first defendant, agreed with the first-named plaintiff, who was acting on behalf of himself and his co-trustee, to purchase from the plaintiffs certain two pieces of land belonging to the estate of the said Smuts for the sum of £200. It was specially agreed between the parties as a condition of the said

contract of sale that the dividend coming to the estate represented by the defendants should be accepted in satisfaction of the purchase price.

At the time when the said agreement was made, the estate of Van Zyl was the only preferent creditor having a claim against the insolvent estate of Smuts, and the defendants were the only persons interested in any dividends which might become payable in respect of such claim.

Thereafter the plaintiffs passed transfer of the said land to the second defendant, in terms of the said agreement.

Before action brought the defendants signed a receipt, in due form, in favour of the plaintiffs for the sum of £175 16s. 11d., being the dividend as aforesaid, and they transmitted the same in a letter in which they informed the plaintiffs that the receipt was sent subject to and in terms of the agreement aforesaid. The plaintiffs wrongfully refused to accept the said receipt, and returned it to the defendants.

The defendants admitted that the plaintiffs had been called upon by the Master to file due dividend receipts.

The plaintiffs, in their replication, admitted the purchase by the second-named defendant from the estate of Smuts, and that it was agreed that the dividend coming to Van Zyl's estate should be accepted as a payment on account of the purchase price, and they admitted that the defendants had tendered a conditional receipt for the second dividend of £175 16s. 11d.

Mr. Juta, Q.C., and Mr. Watermeyer for the plaintiffs.

Mr. Rose-Innes, Q.C., and Mr. Graham for the defendants.

Emile van Noorden deposed that he was one of the trustees in the insolvent estate of Jacques Smuts. The first account in the estate was prepared in March, 1891, and submitted in June, 1891. He had various transactions with Mr. Smuts on behalf of Van Zyls. In August, 1890, he had a settlement between the Van Zyls and himself. They went through the books together; a balance of £124 odd was arrived at, for which witness received a promissory note; in that settlement the dividend of £32 3s. 4d. appeared. In December, 1890, he sent certain documents to the Van Zyls for signature; amongst others a receipt for dividends. Some correspondence took place between Smuts and himself, and finally the receipt for £175 was signed by the defendant.

Examination continued: He sold certain land to the defendants for £200. They were the only persons interested in it. The ground was now much more valuable. The liquidation and

other expenses were paid by witness on behalf of Van Zyl. The Master had to institute proceedings against the defendants in order to get receipts, and witness had been put to an expense of £10 or £11 on account of that.

Cross-examined: The settlement took place in 1890, in the presence of Mr. Van Wyk and Mr. Van Zyl. Mr. Van Wyk was now dead. The £32 was included in the account settled in August, 1890. In the account (produced) rendered to the defendant at the date of settlement the £32 did not figure, but it did in pencil in the book (produced). There were many other items also which did not appear in the account. The 10 per cent. commission shown in the account was for auctioneer's fees in the sale of the land to the defendants. The pencil entry of the £32 was made at the time of the settlement. The liquidation account showed that the defendants were entitled to the £32, and he would swear that he showed that account to the defendant. Besides, they saw the book with the £32 shown in pencil.

The Chief Justice: What proof had the defendants that you had credited them with the £32 besides this pencil note?

Witness: They never asked for any further proof.

Cross-examination continued: Did not bank the moneys he received as trustee in the estate separately. He got the receipt for the £32, and he sent it in to the Master with words of his own written underneath after he received the receipt. Put it in to the Master's hands as a receipt signed by the two executors. He thus tampered with the receipt, but thought it was not wrong to do so. Supposed the stamp was affixed to the receipt after he had written the words underneath.

Mr. Innes read the evidence of the late Mr. Van Wyk, taken on commission, which stated that it was only in January, 1892, that the defendants first discovered that the £32 was due and that their efforts to get it out of Mr. Van Noorden had failed.

Witness reiterated that the £32 was included in the 1890 settlement and that Mr. Van Wyk was wrong. Regarding the receipt for £175, the conditions of the sale were submitted to Van Zyl. Van Zyl said he had no money to pay for the land, but witness told him all he would have to pay was the difference between the purchase price and the dividend due to Van Zyl, and that he (witness) would advance it. No mention was made of any amount. He did not tell Van Zyl that it would cost him nothing except the costs. Afterwards he arrived at the amount of £85 18s. 10d. as due to him. He

rendered the defendants an account showing this, but he had no press copy. He usually kept a press copy of his accounts and letters, but he was at Piquetberg, and did not have his copying-press with him. In June, 1893, he wrote to the Master, saying that the dividend was made over to him by the defendant.

Re-examined: Never acted as the agent of the Van Zyls. Regarding the £32, the first liquidation account was duly published. The £120 given by the Van Zyls in promissory notes was a final settlement of everything between himself and Van Zyls, and that was why no accounts were submitted. The Van Zyls never disputed anything; they always asked for time in which to pay the promissory notes for £120.

By the Court: He was surety for the bond passed by Van Zyl in favour of Mr. Jones and the late Mr. Fairbridge, and he charged 5 per cent commission for being security. Did not know if the estate was solvent at the time. They came to him in 1885 for £40, which he advanced.

Peter Marthinus G. van Zyl, the defendant, said he had had many transactions with Mr. Van Noorden. It was not true, as stated by Van Noorden, that in August, 1890, he came up to Cape Town and had a settlement with him. He came, with Mr. Van Wyk, to Cape Town in 1892. Van Noorden asked him if he had got any money; witness said no, and Van Noorden replied that if he did not pay him he would summons him the next morning. Witness and Van Wyk then went to the Master's Office and looked at accounts. Mr. Van Wyk then found that the sum of £32 on dividends was due to the estate, and that was the first they ever heard of it. They went back to Van Noorden and asked him for the dividend. Van Noorden said he had paid it into Smuts' estate. Van Wyk asked him why, but Van Noorden did not reply. Subsequently Van Noorden summoned him for £120.

Mr. Innes said that that case was withdrawn, and the £120 was still unpaid.

Examination continued: Referring to the purchase of the land for £200, witness said Mr. Van Noorden asked him to take the ground. Witness replied that he had no money, but Van Noorden said he would help him, and that it would only cost him £30—expenses. Mr. Van Noorden said he would advance this sum and take a mortgage bond for the amount. Afterwards he gave Van Noorden a power of attorney to pass a bond, and subsequently he received the transfer of the land, and a bond of £85 10s., instead of the £30 odd, was passed in favour of Van Noorden. Had never received an account from Van Noorden showing how the £85 10s. was arrived at.

Cross-examined: The purchase price was £200. Had never bought property before. Did not know anything about Government dues to be paid by purchasers of land. Knew that Van Noorden made an account, showing that witness owed £120, but did not go into the account when he gave the promissory note for that amount. The reason why he gave Van Noorden the receipt for the £32 was because he was afraid he would be summoned again for the £200, the purchase price of the land. Van Noorden always threatened to do this if he did not sign the receipt for the £32.

By the Court: £200 was to be paid for the farm, but no cash was to pass. Mr. Van Noorden said that anything that had to be paid over and above the dividends due, together with the costs £32, he would advance and take a bond.

Jacob John Henry Smuts deposed that Mr. Van Noorden came down to the farm about the sale. Witness made a bid of £200, but it was not accepted, and after the sale Mr. Van Noorden tried to get Mr. Van Zyl to take over the ground. Van Zyl was his father-in-law. He heard the negotiations, and he heard Van Noorden tell Van Zyl that it would cost within a couple of pounds of £30 for the costs, and that he would advance it and take a bond. Heard Van Zyl distinctly say, when he signed the power of attorney in blank, that the costs were not to exceed the £32.

Cross-examined: Knew what the expenses were on such purchases of farms. Believed that Van Wyk objected to the bond of £85. The agreement was that it would not exceed £32. Witness thought that the bond should never have been passed.

The Court granted absolution from the instance, with costs *de bonis propriis* against the plaintiff.

The Chief Justice said: This action should, in my opinion, never have been brought. If it is said that it is brought because the Master insisted upon having the defendants' receipts, then the action should not have been persisted in when the Master withdrew his objection. Now it appears to me that this action is really brought by the trustees on behalf of Mr. Van Noorden in his individual capacity. So far as the trustees are concerned, they have absolutely no interest in the affair. It is an action to compel the defendants to give receipts for two amounts—£175 16s. 11d. and £32 3s. 4d. As to the first of these items, it is alleged in the declaration that it was duly credited with the knowledge and consent of both defendants in account between the first-named plaintiff and the second-named defendant in the estate of the late Gideon van

Zyl. But there is no evidence whatever that the £32 3s. 4d. was so credited. There is a book kept by Van Noorden in which this amount appears. He says he showed this book to Pieter van Zyl, but Van Zyl denies having seen the book; but no account was submitted, as it should have been, to Van Zyl showing this £32 3s. 4d. to be credited. In no sense, therefore, can it be said that this amount of £32 3s. 4d. has ever been paid to the defendants, and as there is no evidence that it has been paid the defendants cannot be expected to give a receipt. Then as to the £175 16s. 11d., we find that Messrs. Fairbridge & Arderne wrote to the defendants informing them that the Master insisted upon having defendants' receipts, and two forms of receipts were sent to the defendants from which they could select. They selected one and sent it duly signed, and it was an unqualified receipt. The receipt is signed by both defendants, but the letter enclosing the receipt says that it is sent on condition that it was acknowledged as full settlement of the purchase price of the land, and that the receipt would not have been signed but for the fact that they were afraid of Van Noorden's threats. The trustees thereupon sent back the receipt. They made no attempt to go to the Master and submit the receipt to him. Now I quite agree with Mr. Juta that it would not have been right on the part of the trustees to submit to the Master the receipt without the qualifying letter; but I am satisfied also, as far as the Master was concerned, that if the letter had been shown to him he would still have considered the receipt sufficient, because there is no denial of the payment of the dividend, and the payment of the dividend was all the Master wanted. So there was no qualification whatever of the receipt to the extent, at all events, that the dividend had been paid. Now, after the evidence that has come out, I am not prepared to say that this is not a condition which the defendants should insist upon, because as between them and the trustees there was a full settlement. There had been a full settlement, the trustees had received their £200 in full before the 28th October, 1893. Therefore, when the defendants wrote to the trustees on that day that their receipt was to be accepted as the settlement for the purchase of the land as between the trustees and themselves, they were justified in claiming that it was a full settlement. No doubt, as between Van Noorden and the defendants, it was a condition which Van Noorden could not accept, but for this Van Noorden has himself to blame in having mixed up his two capacities,

that of trustee and his private capacity. This action, I consider, has been brought by the trustees to enable Van Noorden to get certain receipts. Now as to the bond for £85 it will be a question in a further action whether the £32 3s. 4d., forming portion of that amount, has been paid or not. At present there is no evidence that it has been paid, but if it should turn out that the £32 3s. 4d. has been paid I strongly advise the defendants not to contest the case but to at once settle up the full amount of £85 without further action, so as to avoid further expenses between the parties. In the present action I am of opinion that there should be absolution from the instance with costs *de bonis propriis* against the plaintiffs.

Their lordships concurred.

Mr. Innes asked for defendants' witnesses' expenses.

Mr. Juta opposed.

The Chief Justice, in allowing the expenses of one of the defendants, commented on the action of Van Noorden in falsifying the receipt received by him from the defendants before submitting it to the Master.

[Plaintiffs' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendants' Attorney, G. Montgomery-Walker.]

SUPREME COURT

[Before Sir J. H. DE VILLIERS (Chief Justice),
Mr. Justice BUCHANAN, and Mr. Justice
UPINGTON, K.C.M.G.]

SIMONS V. SIMONS. } 1895.
Feb. 27th.

This was an action for divorce instituted by the plaintiff against her husband on the grounds of his adultery.

Mr. Buchanan for the plaintiff.

Defendant in person.

Johanna Clementina Simons, the plaintiff, deposed that she was married to the defendant on the 10th February, 1891. There was one child. They lived happily together up to March, 1894, when her husband deserted her. They had had no quarrel, and there was no apparent reason for his desertion. Subsequently she discovered her husband in a house in Gore-street with a woman he was living with named Christiana Geling. Witness was now in service with Mrs. Fraser.

Defendant said that the desertion was on his wife's part. She left him without his knowledge and he found her at her father's house. She refused to return to him.

Witness said that was not true. Her husband drank a great deal and she had to pay the rent of the house. She was therefore obliged to go home to her father.

Defendant continued that he had seen her out at night at Sea Point walking with a man. Had also seen her at other times with men. He admitted that he had committed adultery.

The Court granted a decree of divorce with costs, plaintiff to have the custody of the child of the marriage.

ROGERS' EXECUTORS V. JESSOP. } 1895.
Feb. 27th.

Rent—Defence—Failure to execute written lease—Repairs.

This was an action for £31 10s., instituted by Richard Villet and Alfred Harris Warmesley, in their capacity as the executors of the late Elizabeth Rogers, against Charles Jessop.

The declaration alleged that the late Elizabeth Rodger was at the time of her death the registered owner of certain immovable property—to wit, a shop and land at Green Point. The said property is still registered in the name of the deceased, and is administered by the plaintiffs as portion of her estate.

In or about October, 1894, the plaintiffs, acting in their capacity, let to the defendant, and the latter hired from them, the said property at a rental of £10 10s., payable monthly, from 15th October, 1894.

On the 15th October, 1894, the plaintiff entered into occupation of the property, and has continued to occupy it since that date.

That there is due to the plaintiffs as rent the sum of £31 10s., being from 15th October, 1894, to 14th January, 1895, which sum the plaintiffs claimed with interest *a tempore moræ*, and costs.

The defendant in his plea said that on or about 4th October, 1894, he agreed to hire, and the second-named defendant (Warmesley) agreed to let the premises at a monthly rental of £10 10s. for a period of twelve months from 15th October, 1894, with the option to the defendant of a renewal for a further period of twelve months at the same rental; that there should be a written lease between the parties containing the aforesaid conditions; and that in consideration of the said lease the plaintiffs would effect certain repairs and alterations—to wit, construct a certain drain to carry off the

kitchen water, to erect a certain gate at the side of the premises, and to effectually strengthen the supports to a certain tank in the rear of the premises.

He said that the plaintiffs had refused and failed, though requested, to carry out their part of the agreement, and that they refused to enter into the written lease, and to effect the repairs and alterations.

He admitted that provided the plaintiffs carried out their part of the agreement, the sum claimed by them was due and payable; that he was willing to pay the same; that he had tendered, and hereby again tendered, the rent provided the plaintiffs were ready and willing, and offered to abide by and perform the terms of their agreement as alleged.

The defendant claimed in reconvention that the plaintiffs be ordered to enter into a written lease containing the conditions above referred to, and effect the repairs and alterations, the defendant tendering the sum of £31 10s. provided the plaintiffs performed their agreement.

The plaintiffs excepted to the defendant's plea on the grounds that it afforded no defence to their claim:

1. Inasmuch as the defendant alleged that there was an agreement entered into between himself and the plaintiff Warmesley, whereunder he claimed the right to resist the plaintiffs' claim, whereas it was not alleged that the plaintiff Warmesley had authority to act, or purported to act, for himself and his co-executor, or for either of them on behalf of the estate.

2. Inasmuch as the defendant admitted that he had had the use and occupation of the premises, and was not justified in law in refusing to pay therefor unless a written agreement be entered into, even assuming that the allegations in the plea were true and correct.

The replication joined issue.

Mr. Searle, Q.C., and Mr. Watermeyer for plaintiffs.

Mr. Molteno for the defendant.

After argument on the exceptions, the declaration was amended by alleging that both plaintiffs, and not Warmesley alone, agreed to execute a written lease.

The rent being admitted, the Court held that the onus was on the defendant to prove the agreement as to entering into a written lease.

The defendant, Charles Henry Jessop, deposed that he was a shopkeeper. In October last he had a shop at the corner of Boom and Buitenkant-streets, but in response to an advertisement in the "Cape Times" he went and saw Mrs. Warmesley, who referred him to her husband.

The same evening he and Mr. Wadmore again called and had a conversation with Mr. Warmesley, when he (witness) hired the shop and house for £10 10s. per month rent. Warmesley said the shop was the property of his wife. Had since found that Mrs. Warmesley was an heir in her mother's estate. Witness asked Mr. Warmesley for a lease, which he consented to, and subsequently a twelve months' lease was arranged for with option to witness of a further twelve months. Warmesley at the time promised to effect certain alterations and repairs to the premises, as suggested by witness, and he also promised to get the lease drawn up. He never kept his promise about the alterations and repairs. He (witness) went into the place on the 13th October, two days before the date agreed upon. Warmesley agreed to this. Witness had expended nearly £50 in fitting up the shop. Witness suggested that the first rent should be paid on the 1st November and thereafter on the first of every month. Warmesley, however, delayed getting the lease drawn up and witness having offered the rent on the 1st November again offered it on the 15th November. On that date he first heard of Mr. Villet. He first heard, in January last, that Warmesley would not give a lease. Witness was in negotiation with him in November for the purchase of the property. Warmesley told him that the shop might have to be sold and witness replied that he was going the right way to ruin him, as he was about to sell the property and he (witness) had not got a lease and had spent his capital in fixtures. Warmesley wanted £1,400 for the shop and witness tried to negotiate the purchase, but failed. It was at this time that he first knew that Mr. Villet was one of the executors, and that a mortgage had to be paid on the property. Mr. Villet then said Warmesley had no right to promise witness a lease. Witness then said he had been led to hire the shop by the false pretences of Warmesley. Subsequently he received a demand for £31 10s., rent from Mr. Villet. He refused to pay unless the lease promised by Warmesley was given him. Mr. Villet replied that neither he nor his co-executor in the estate of the late Mrs. Rogers had promised a lease, and that he (witness) only had a monthly tenancy.

Cross-examined by Mr. Searle: Did not know when he agreed to take the shop that the property was in Mrs. Rogers's estate. Warmesley did not tell him that it was property bequeathed to his wife, and that a lease could only be given if certain eventualities came about. He found it all out in November, however, and then tried to buy the property. Did not himself have a

lease drawn up, because he believed Warmesley would keep his promise. The fixtures were put up by him as movable fixtures.

Re-examined: When he tendered the rent he was always careful to do so on condition that the lease was given him. Knew nothing whatever about Mr. Villet until he had been six weeks in occupation.

Walter Wadmore, professor of singing, said he resided at Varney's Corner with the last witness. Was present at the negotiations between Jessop and Warmesley. Witness suggested a long lease, but Jessop objected, and suggested a twelve months' lease, which Warmesley said there would be no difficulty about. Also heard Warmesley promise to effect certain alterations and repairs. Often saw Warmesley in the shop, and he never raised any objection about the lease.

Cross-examined: Did not know at the time that Warmesley was insolvent, or any of the circumstances connected with the property but that came out afterwards.

This closed the evidence for the defendant.

Richard Villet, house agent and broker, of Cape Town, deposed that he was co-executor testamentary with Mr. Warmesley in the estate of the late Mrs. Rogers (Mrs. Warmesley's mother). The property consisted wholly of landed property at Sea Point, and there was a bond of £2,000 on it, and other debts amounting to £350. Mr. and Mrs. Warmesley were married in community, and under the will Mr. Warmesley had to pay about £1,400 off the bond before he could get transfer; and Mrs. Stanley, the other daughter of Mrs. Rogers, had to pay the remainder of the bond, £1,250. Witness administered the estate. The son-in-law Stanley occupied the shop Jessop was now in, and he had to leave. There were nine cottages, all let to monthly tenants. Warmesley let the properties, collected the rents, and handed them over to witness. Warmesley was co-executor with witness, and no lease could be given by Warmesley, as it might have prejudiced the impending sale of the property. Warmesley became insolvent about two years ago. The value of the entire property would be about £3,000, bequeathed to her three children by Mrs. Rogers. When Jessop came to him about purchasing the property he never said a word about a lease promised by Warmesley. Witness was quite certain of this. Was not made aware that Warmesley had promised Jessop a lease.

Cross-examined: Warmesley informed him that he had not promised any lease whatever to Jessop.

By the Court: Warmesley had attempted, before letting the place to Jessop, to raise the money required by the will, without success. It might be that it would have been Warmesley's interest to get a tenant on a long lease. If Warmesley had told him that he had given Jessop a lease witness would have objected on the ground that it was against the interests of the sale. The creditors were pressing and the sale had to be effected to pay the debts. In his opinion there was no other way of paying the debts than by selling the property.

Alfred Harris Warmesley, one of the plaintiffs, said that Jessop asked for a lease, but witness said it was not then in his power, but that as soon as it was in his power, he would give him any lease he wanted so long as the rent was paid. Wadmore asked witness to make out an agreement on the spot, but witness reiterated that he could not do so, and Jessop said it would be all right. Witness did not promise to effect alterations and repairs. The only thing spoken about was a drain and some little papering in the passage. This latter witness did himself. After Jessop had been in about six weeks or two months he said to witness he supposed he could do with some money, and asked about the agreement. Witness said he must go to Mr. Villet about a written agreement. Witness was at the time trying to raise the money to pay off the debt on the property. Had failed to do so. Had no authority to give a lease without consulting Mr. Villet, but he would have done so if he could have raised the money and got transfer. He was still in hopes of raising the money, and then he would give Jessop a lease so long as the rent was paid. Had no intention of ejecting Jessop. The liabilities remaining on his (witness's) insolvent estate would be about £200, and he would have to pay this as well as the bond on the property. Would have to pay about £1,400 altogether, and he was still in hopes of raising it.

Cross-examined: Denied most emphatically the evidence of Jessop and Wadmore that he agreed to give the twelve months' lease.

After argument, the Court gave judgment for the plaintiffs for the amount of rent claimed, and absolution from the instance on the claim in reconvention, with costs.

The Chief Justice said: It appears to me that in this case there has been a most unfortunate misunderstanding between the parties. I confess to a feeling of great sympathy for the defendant in this case because I have no doubt whatever that he understood he was to have the property for a term of twelve months, with the option of another twelve months; but I am not satisfied that the plaintiff Warmesley also so

understood the agreement. Warmesley probably at the time anticipated that he would ultimately become the owner, and he, in my opinion, told the defendant that if he became the owner he would allow him to remain for twelve months with the option of twelve months longer, but I am not satisfied that Warmesley ever promised to have a written agreement executed. Now, if the defendant had understood that there was to be a written agreement—and that is the only question in this case—why did he not have one prepared? He had ample time to have one prepared, and to submit it for signature; instead of that he allows the matter to lie by for three months. If he had prepared a written agreement, and submitted it for signature, the whole question would have come out at once. Now, I think Mr. Wadmore also misunderstood the purport of the conversation, and another reason for my thinking there was a misunderstanding is that when it comes to the question of the repairs there is really no evidence in support of the defendant's statement. Mr. Wadmore remembers something about a gate, but as to the rest he knows nothing about it, whereas the defendant says he made it a *sine qua non* of the lease that all these repairs were to be effected. Now, the only question that remains is whether there was to be a written agreement, and I am not satisfied that there was any undertaking on the part of Mr. Warmesley to give a written agreement. That being so, there must be judgment for the plaintiffs for the amount of rent claimed, and absolution from the instance on the claim in reconvention. I express no opinion as to whether the defendant should be turned out before the twelve months have expired, but I strongly advise the plaintiffs to allow him to remain unless it is absolutely necessary to sell the property. There is another question, whether there was not a promise quite independent of any written lease. It would be best to allow the defendant to remain for the full two years; but in my opinion it has not been proved that the plaintiffs are bound to execute a written agreement and judgment must therefore be as stated.

Their lordships concurred.

[Plaintiffs' Attorney, W. E. Moore; Defendant's Attorneys, Messrs. J. C. Berrange & Son.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS (Chief Justice),
Mr. Justice BUCHANAN, and Mr. Justice
UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

TENNANT V. NORTJE. } 1895.
Feb. 28th.

Mr. Graham moved for provisional sentence
for the sum of £350, due on a mortgage bond.
Granted.

ERASMUS V. MOOLMAN.

Mr. Buchanan moved for provisional sentence
on a mortgage bond for the sum of £53, with
interest at 6 per cent. from 27th March, 1893.
Provisional sentence was granted.

HIDDINGH V. UYS.

Mr. Graham moved for provisional sentence
for the sum of £1,250, with interest at 6 per
cent. from 1st December, 1893, due on a mort-
gage bond.
Provisional sentence granted, and property
declared executable.

MCLAREN AND CO. V. SMIDT.

Mr. Maskew moved for the final adjudication
of the defendant's estate as insolvent.
Order granted.

WILLS V. LAUBMEYER AND WIFE.

Mr. Tredgold moved for provisional sentence
against defendants for the sum of £67 17s. 5d.
due on a promissory note.

Mr. Watermeyer consented to provisional
sentence being taken against the first-named
defendant, but asked that the case against the
second defendant might stand over for the
arrival of her affidavit.

The Court granted provisional sentence
against the first defendant, the case against the
second defendant to stand over.

VAN HOEVEN'S EXECUTORS V. JACOB'S EXECUTORS.

Mr. Maskew moved for provisional sentence
for the sum of £300, with interest from March
20, 1885, due on a mortgage bond.
Provisional sentence was granted.

MCKENZIE AND CO. V. SCHIEMANN.

Mr. Sheil moved for judgment against the
defendant in his capacity as master of the
German barque Ernestine for the sum of £24,
with interest from January 31, 1895, being for
towage services, hire of engine, &c., on behalf of
the ship; also for the sum of £311 17s. 6d., with
interest from January 31, 1895, being for work
and labour done in connection with the unloading
and reloading certain cargo on board the
Ernestine.

The defendant consented to judgment with
costs.

BOALCH V. SCHIEMANN.

Mr. Sheil moved for judgment for the sum of
£27 17s. 1d., with interest from 31st January,
1895, being for meat supplied for the main-
tenance of the master and crew of the Ernestine.

The defendant consented to judgment with
costs.

BURMEISTER V. SCHIEMANN.

Mr. Sheil moved for judgment for the sum of
£740 9s. 5d., with interest from 31st January,
1895, being for money lent and advanced on
behalf of the Ernestine.

The defendant consented to judgment with
costs.

SHORT AND CO. V. SCHIEMANN.

Mr. Sheil moved for judgment for the sum of
£65 10s., with interest from 31st January, 1895,
being for blacksmith's work done to the
Ernestine.

The defendant consented to judgment with
costs.

HYLAND V. SCHIEMANN.

Mr. Sheil moved for judgment for the sum of
£1,216, with interest from 31st January, 1895,
being for work and labour done in repairs
effected to the Ernestine.

The defendant consented to judgment with
costs.

REHABILITATION.

Mr. Maskew applied for the rehabilitation of
Alexander Raphael.
Order granted.

GENERAL MOTIONS.

IN THE MATTER OF THE CAPE OF GOOD HOPE BANK.

Mr. Innes, Q.C., applied for an order
to make absolute the rule nisi for
authority to the official liquidators to refund to

certain shareholders, described as being on list B, the amounts paid by them as contributories in excess of their liabilities in respect of debts due by the bank at the dates when the said contributories became such shareholders.

The rule was made absolute.

PRETORIUS V. GREEK.

Mr. Searle, Q.C., applied for an order setting aside certain attachment of printing plant and material obtained at the instance of applicant pending an action against respondent for recovery of rent alleged to be due under a lease, and that applicant do pay the costs.

Mr. Sheil, for the original applicant (Pretorius), applied for a further postponement in the matter owing to the illness of the respondent in the application.

Postponement granted to the 12th March, Pretorius to pay the costs of the day.

DU PLESSIS V. FERREIRA.

Mr. Searle, Q.C., applied for an order for the attachment of the person of the respondent for contempt of Court in respect of his failure to carry out the terms of certain award made a rule of Court on August 1 last in respect of the subdivision of the farm Rietfontein, in the district of Humansdorp.

Order granted that the sheriff be authorised to execute the necessary transfer on behalf of the respondent on the 20th April, unless the respondent shall in the meantime show cause to the Court, after due notice has been served on him, why such transfer should not be effected. Notice of the order to be forthwith served on the respondent.

Ex parte MINTO. } 1895.
Feb. 28th

Marital power—Non-exclusion in ante-nuptial contract—Mortgage bond.

The Court granted leave to the petitioner, who was married to her husband by ante-nuptial contract, the marital power not being excluded, to pass a mortgage bond, without the assistance of her husband, whose whereabouts were unknown, for the balance of the purchase price of certain property which she had bought.

This was the petition of Elizabeth Ann Minto (formerly Trevethick), married without community of property to William Charles Minto.

The petitioner alleged that prior to her marriage an ante-nuptial contract was executed between herself and her husband, the marital power not being excluded.

That on 14th February, 1891, whilst resident at Kimberley her husband deserted her, and beyond hearing from him shortly after from the Orange River Station she had had no information as to his whereabouts, although she had done her best to ascertain the same.

That she had purchased certain property in the Cape division for the sum of £725, of which she was prepared to pay the sum of £325 and pass a first mortgage for £400, but that as the ante-nuptial did not exclude the marital power the bond could not be registered unless she were assisted by her husband, who has no direct or indirect interest in the matter.

That by reason of the absence of her husband and her ignorance as to his whereabouts she could not obtain his assistance.

The prayer was for (1) an order authorising the petitioner to pass a first mortgage on the property for £400 without the assistance of her husband, and (2) authorising her to deal hereafter with the property, or with other assets she might acquire, or in other transactions she might enter into without the assistance of her husband.

Mr. Sheil appeared for the petitioner.

The Court granted the first prayer of the petition.

[Petitioner's Attorney, C. C. Silberbauer.]

SMITH V. SMITH.

Mr. Sheil applied for an order admitting applicant to sue *in forma pauperis* in an action against her husband for restitution of conjugal rights, failing which for divorce, it having been found impracticable after due inquiry to ascertain where her husband is residing for the purpose of serving the rule *nisi* already granted.

Order granted authorising the service of the rule by means of one publication in the "Sydney Daily Telegraph": rule returnable on the last day of May term.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS (Chief Justice),
Mr. Justice BUCHANAN, and Mr. Justice
UPINGTON, K.C.M.G.]

BEETHAM V. SLAMIE. { 1895.
March 1st.

Tender—Insufficiency—Work and labour.

This was an appeal from a decision of the Resident Magistrate for Simon's Town in an action in which the present respondent, plaintiff in the Court below, sued the appellant, defendant, for the sum of £20, being for work and labour done in connection, as the account annexed to the summons stated, with the capture, killing, and cutting up of a whale during the months of August and September, 1894, at the special instance and request of the defendant.

The defendant tendered £1 4s. before the action was brought, and denied liability on the claim.

The Magistrate gave judgment for the plaintiff for £5 with costs. The facts appear from the Magistrate's reasons, which were as follows:

In this case I am of opinion that the plaintiff and his crew first saw the whale, and gave the usual signal by landing a man, and then making a fire. Defendant's boat was the first to take advantage of this.

The plaintiff rendered defendant further assistance by showing him the whale, and after it was harpooned he lent an oar, and remained with defendant as long as possible, and they are entitled to some remuneration. I therefore consider the tender insufficient, and gave judgment for plaintiff for £5 and costs.

The defendant now appealed.

Mr. Graham for the appellant.

The respondent was not represented.

The Court dismissed the appeal.

The Chief Justice said: In a matter of this kind the Court should not scrutinise the exact amount of damages awarded by the Magistrate. The plaintiff was the captain of the boat, and there was no doubt the crew of the boat did some service in the capture of the whale, and that the captain of the boat was entitled to higher remuneration than the rest of the crew. Their services were not very great, but some services were performed—their boat was attached to the whale for about an hour, and the very weight of the boat would impede the whale. They also were the people who helped to give notice of the capture, and they went for the

tug, which also was of some assistance, and after the whale was landed these men assisted in cutting it up. Under these circumstances, I think the amount awarded to the captain of the boat was very moderate, and the appeal must be dismissed.

[Appellants' Attorney, D. Tennant.]

VAN NOORDEN V. VAN ZYL. { 1895.
March 1st.

Discovery—332nd Rule of Court.

This was an application on notice to the plaintiff's attorneys that they would be required to show cause why the plaintiff should not be ordered to discover on oath during the course of this day (28th February) all books, accounts, papers, correspondence, and documents which are or have been in his possession or power relative to any matters in question in the above action; also why the costs of the application should not be ordered to be costs in the cause.

The defendants' attorney alleged, *inter alia*, that his object in getting a discovery was to ascertain from the books and papers of Mr. Van Noorden the exact position of affairs, and to ascertain the detailed items with which the defendants have from time to time been credited and debited in account with the plaintiff. That this was necessary if the defendants were to comply with the advice of the Chief Justice given in a recent action.

In reply, the plaintiff's attorney stated that his client had no objection to make the affidavit of discovery in due course, but that he and his attorneys both objected to be compelled to lay aside all other business for the purpose of complying immediately with the demands of the defendants, who, without the present motion, were entitled to apply in Chambers in the ordinary way for an order of discovery, which would be duly complied with.

Mr. Rose-Innes, Q.C., in support of the application, relied on the 332nd Rule of Court and on *Wiese v. Mostert* (3 Sheil, 133; 10 Juta, 137).

Mr. Juta, Q.C., for the respondent.

The Court granted the application.

The Chief Justice said: Sufficient notice of applications of this kind should be given. Yesterday afternoon when the Court was about to adjourn this application was sprung upon it, and counsel had not even time to look into the authorities, and the Court was to be hurried into giving the order at once. Had time been given to counsel no doubt the practice laid down by the Court would have been made clear. (His lordship referred to an application made in Chambers on 9th June, 1893, in the case of

Heydenrych v. Farmer. "for an order directing the defendant to make discovery on oath of all documents which are or have been in his possession or power relating to any matters in question in this suit." The order granted by the Chief Justice was as follows: "Grant the order, but not to be executed until after the declaration has been filed and served on defendant. In *Wiese v. Mostert* the Court ordered a discovery before declaration, but that was at the instance of the defendant against the plaintiff, who would be presumed to know what the matters in question are. The defendant could not know from the summons what the matters in question are, and therefore the declaration should first be filed.") His lordship continued: In the present case it is the defendants who apply for discovery, and if the plaintiff has already served his summons and his declaration, surely he would know, better than anybody else, what the matters in dispute were; and instead of opposing the discovery, he ought at once to have consented. The only mistake the applicant made was in pressing for discovery within twenty-four hours. The Court will grant the order, the costs to be costs in the cause. Forty-eight hours would seem to be a reasonable time to allow to the plaintiff.

[Applicant's Attorney, G. Montgomery-Walker; Respondents' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

DE BEERS CONSOLIDATED MINES } 1895.
V. KIMBERLEY WATERWORKS } March 1st.
COMPANY.

Construction of agreement—"Obtain and purchase"—Restraint upon exercise of legal rights—Proviso to clause.

By agreement between a Mining Company and a Waterworks Company the former undertook during the term of the agreement to "obtain and purchase" all the water required by them for mining purposes from the latter company and from no other person or company whatsoever; provided that nothing herein contained shall prevent the said Mining Company from using any water obtained by it from the mines or from its wells.

Held, that, the Mining Company were entitled to use for mining purposes water from a mine which they acquired and worked after the date of the agreement and water which they diverted, with the consent of the Kimberley Town Council, from the

Municipal area, it being clear that in neither case was the water acquired by purchase or by virtue of any transaction equivalent to a purchase.

This was an appeal from a judgment of the High Court of Griqualand West, delivered in two actions heard in that Court in December last. In the first the De Beers Mines claimed a declaration of rights under clause 6 of an agreement entered into between the parties on the 26th November, 1888, and in the second the Kimberley Waterworks Company claimed the sum of £5,000 damages for alleged breaches of the agreement and for a perpetual interdict.

The following is the clause of the agreement alleged to have been broken by De Beers: "That the said De Beers Consolidated Mines (Limited) shall at all times for and during the whole and full term of this agreement obtain and purchase all the water required by them for their mining purposes from the said Kimberley Waterworks Company (Limited), and from no other person or persons or company or companies whatsoever; provided, however, that nothing herein contained shall prevent the said company from using any water obtained by it from the mines or from its wells or reservoirs."

The facts in the first case, as found in the Court below, are as follows: In the year 1888 the Waterworks Company were in the enjoyment of a practical monopoly of the local water supply, with the exception of that obtained from wells or rain water; they had at great expense erected machinery, constructed reservoirs, and laid down pipes for supplying Kimberley with water from the Vaal River, having obtained the necessary legal powers for that purpose; under an agreement with the Kimberley Town Council, made in 1880, they had the exclusive right of supplying the Municipality and its inhabitants with river water for a period of twenty-five years from that date; in the neighbouring Municipality of Beaconsfield they had no such monopoly, but they had in fact extended their system to that Municipality, and theirs was the only existing source of supply, and the same may be said of the various mining companies, including the plaintiff company, then carrying on operations in the four mines of Kimberley, De Beers, Du Toit's Pan, and Bultfontein, and these companies, so far as they required extraneous water for their mining purposes, had to obtain it from the defendants. In the year 1888 De Beers acquired certain Parliamentary powers, by Act 38 of that year, which is entitled the "De Beers Consolidated Mines Water

Supply Act." The De Beers Company accordingly obtained the necessary statutory powers for bringing another supply of water from the Vaal River for the purposes aforesaid. There was a clause saving the vested rights of the Waterworks Company; a maximum tariff was laid down for the supply of water to Beaconsfield, and the works had to be begun within one year, and completed within three years of the passing of the Act, which was promulgated in August, 1888. Within three months of the passing of this Act De Beers and the Waterworks Company entered into the agreement which is the subject of this action. Under this agreement, to state its effect shortly, in consideration of the Waterworks Company (1) paying the De Beers Company the sum of £10,000; (2) supplying the mining companies at Kimberley and De Beers, and also any mining companies or properties in "the Du Toit's Pan and Bultfontein mines, or mines adjacent thereto," which might in future be acquired by or become amalgamated with the De Beers Company, with water for mining purposes at a reduced rate; (3) making similar arrangements for the supply of the De Beers Company's township proposed to be established at Kenilworth, and of the Municipality and inhabitants of Beaconsfield. For these considerations the De Beers Company for their part undertook: (1) To obtain all the extraneous water required for their mining purposes from the Waterworks Company; (2) to oppose any competing company or venture having objects similar to those of the Waterworks Company; (3) to cede to the Waterworks Company all the concessions and rights they then held in connection with the construction and maintenance of waterworks. Such appears to be the general effect of this agreement, which was to be in force for a period of twenty-five years, and in accordance with its terms the Waterworks Company paid the money and reduced their terms for water supply, while the De Beers Company ceded their concessions and rights. No difficulty, so far as appears from the evidence, seems to have occurred in connection with the working or interpretation of this agreement till a comparatively recent date. So far back, however, as 1891, when the amalgamation of the various holdings in the four existing mines by the De Beers Company was already practically complete, that company acquired the farms of Oliphantsfontein and Benaauwdheidsfontein, commonly described as the Wesselton Estate, on the latter of which another diamond mine, called the Premier mine, had been discovered. This mine is alleged by the plaintiffs in their declaration to be adjacent to the Du Toit's Pan and Bultfon-

tein mines, but according to the distances set forth in the defendants' pleas, and which were admitted by the plaintiffs' counsel in opening the case to be correct, it is distant more than a mile and a half from Du Toit's Pan mine, and more than two miles from Bultfontein, and that being so, the allegation of adjacency was not relied on. The Premier mine makes water in enormous quantities, which has to be continuously pumped out, and the volume of which is far greater than is required, or is likely to be required, for purposes connected with the mine. The surplus water thus pumped out the plaintiffs propose to collect and to lead in pipes to be laid down at large expense and for a distance of several miles, to their dam or reservoir at Kenilworth, in order to use it for mining purposes in connection with the Kimberley and De Beers mines.

The defendants denied the plaintiffs' right to use the water as proposed on the ground that such action would amount to a breach of their agreement, and on the further special ground that the plaintiffs had leased the Premier mine to one Ward, that they had parted with the water rights to Ward as lessee, and that therefore they could only acquire the water by purchasing or obtaining it from Ward, which by the agreement they are prohibited from doing.

In the second action by the Waterworks against De Beers the facts are briefly these:

It appears that in the month of January last the De Beers Consolidated Mines applied to and obtained permission from the Town Council of Kimberley to construct a dish drain across and from the Transvaal-road with the object of diverting and conducting into the Kenilworth dam the water which after rains flows down the drains on each side of the Transvaal-road. The water in question is surface rain-water falling upon an area of about 278 acres in the Municipality of Kimberley, which after flowing down various drains in the town is at length collected into the two drains along the Transvaal-road. It flows thence on to Municipal land, and at length finds its way into the White Dam, the property of the Municipality, and the overflow from that dam runs into Diebel's Vlei, a portion of which belongs to the De Beers Consolidated Mines.

The Waterworks Company complain that by digging the dish drain across the Transvaal-road and conducting the water into the Kenilworth dam, and using it for mining purposes, the defendant company are guilty of a breach of clause 6 of their agreement.

In the first action judgment was given for the defendants with costs, and in the second action

judgment was given in favour of the plaintiffs for £100 damages. A perpetual interdict being also granted against De Beers.

From these judgments the De Beers Consolidated Mines now appealed.

Mr. Rose-Innes, Q.C., Mr. Solomon, Q.C., and Mr. Webber for the appellants.

Mr. Searle, Q.C., and Mr. Joubert for the respondents.

The appeals were allowed.

The Chief Justice said: But for the terms of the agreement in question the De Beers Company would have had the undoubted right to obtain, wherever and from whomsoever they could, all the water required by the company for mining purposes. Before discussing the effect of the agreement let me state in a few simple words what the De Beers Company have proposed to do, and what they have actually done. They intend to collect the surplus water issuing from the Premier mine and to lead it on to their mines at Kimberley and De Beers, to be there used for mining purposes. That water admittedly belongs to them and would run to waste unless utilized by them. It was not sought for by them but was found by Ward, who was working the Premier mine under an arrangement with them, and who does not, as far as the evidence enables us to judge, object to their using the water for their own mining purposes. There is no suggestion of any colourable arrangement between them and Ward. The mine is theirs and the water collected from the mine belongs to them, and they intend to exercise the obvious and natural right of utilising what belongs to them instead of allowing it to go to waste. Now let me state what they have actually done. During rains a considerable quantity of rain-water falls upon the Municipal area of Kimberley, and this water, unless interfered with by artificial means, flows in the direction of the so-called White Dam. The De Beers Company, with the consent of the Town Council, have constructed a dish drain in the Transvaal-road, the effect of which was to divert the water into their dam at Kenilworth, where it became available for mining purposes as well as for irrigation. No consideration was given to the Town Council for the right of acquiring the water. It has been suggested in argument that the undertaking to keep the dish drain in order constitutes a consideration. There would have been some weight in the suggestion if the dish drain had already been in existence and, as compensation for keeping it in order, the De Beers Company had been allowed to use water falling within the Municipal area. But the correspondence between the company and the

Town Council clearly shows that the obligation to keep the drain in good order was imposed upon the company as a condition subject to which only they acquired the right of making the drain. The arrangement was made in perfect good faith and there is not the slightest suspicion of its being intended as a purchase of Municipal water under colour of an agreement to construct and maintain a drain. The right, then, of the De Beers Company to utilise the water from the Premier mine, as they propose doing, and to use the water from the Municipal area as they have already done, is perfectly plain, and the question to be determined is whether they have surrendered that right by their agreement made with the Waterworks Company on the 26th Nov., 1888. Under that agreement the sum of £10,000 was to be paid by the Waterworks Company to the De Beers Company. This sum is stated by Mr. Justice Solomon to have been paid for the right to supply the De Beers Company with water for the period of twenty-five years, but, under the agreement, the Waterworks Company acquired other important rights in addition to that of supplying the De Beers Company with water. They acquired the valuable concessions which the De Beers Company had previously obtained in connection with the construction and maintenance of waterworks for the supply of Kimberley with water. They obtained moreover an undertaking that the De Beers Company would not directly or indirectly assist in the establishment or promotion of any other company or venture in the district of Kimberley having objects similar to their own, but would on the contrary actively oppose any such Company or venture. The clause which is relied upon as depriving the De Beers Company of the rights, which I mentioned at the outset, is the following: "The said De Beers Consolidated Mines (Limited) shall at all times for and during the whole and full term of this agreement obtain and purchase all the water required by them for their mining purposes from the said Kimberley Waterworks Company (Limited) and from no other person or persons or company or companies whatsoever; provided, however, that nothing herein contained shall prevent the said company from using any water obtained by it from the mines or from its wells and reservoirs." The De Beers Company then are prohibited from "obtaining and purchasing" water required for mining purposes from any other person or company. It does not follow that they are prohibited from obtaining water from any other source if the transaction does not partake of the nature of a purchase. If the words used had been "obtain or purchase" there would have been some force in the contention that the acquisition of water from any

source whatever is prohibited, although even then the juxtaposition of the two verbs would have justified the Court in allowing the one to qualify the other. But the use of the words "obtain and purchase" leaves no doubt in my mind as to the intention of the parties. Mr. Justice Solomon seems to read these words as meaning "obtain by purchase" but he confines the meaning to the obligation to obtain all the water required for mining purposes from the Waterworks Company. In fairness as well as in grammar, it ought to be extended to the prohibition against obtaining water from anyone else. If I am right in the view that the prohibition only applies to the acquisition of water by means of a purchase or any transaction equivalent to a purchase, the subsequent proviso cannot be allowed to extend the prohibition to every other mode of acquisition. A proviso of this nature is often introduced *ex abundante cautela*, and ought not to be allowed to explain a stipulation which is perfectly intelligible and therefore in no need of explanation. The learned Judge-President says: "In making this proviso it appears to me that the plaintiffs, that is the De Beers Company, play the part of stipulators, and that any ambiguity in its terms should be construed against them in accordance with the principle laid down by *Voet*" (45, 1, 23). But it appears to me that the Waterworks Company are the stipulators in this clause. They stipulate for the imposition of an onerous restraint on the plain legal rights of the De Beers Company, and the sole object of the proviso is to prevent the possibility of the restraint being applied to the use of the water from their own mines. A proviso which was introduced for the purpose of preventing the restraint from being too onerous ought surely not to be used for the purpose of making the restraint more onerous. Even if the learned Judge-President be correct in the view that any ambiguity in the terms of the proviso should be construed against the De Beers Company, such construction would still leave the precedent stipulation in favour of the Waterworks Company untouched. Any ambiguity in the terms of that stipulation must, according to the rule of construction adopted in the Court below, be construed against the Waterworks Company. In my opinion the stipulation is perfectly intelligible without the assistance of the proviso and was not intended to be made more stringent by means of the proviso. The De Beers Company have not acquired any water by purchase or under colour of any transaction equivalent to a purchase, and no breach or intended breach of the agreement on their part has been proved. No question has

been raised in this Court or in the Court below as to the form of the action brought by the De Beers Company. It has been assumed on both sides that if they have the right to collect and make use of the water which accumulates in the Premier mine, and would otherwise run to waste, they are entitled to a declaration of their rights in that respect. In the first action, therefore, an order will be made in terms of the second prayer of the declaration. In the second action, which was brought by the Waterworks Company, judgment must be given for the defendants. In both actions the costs in this Court and in the Court below must be paid by the Waterworks Company.

Mr. Justice Buchanan: It strikes me that the learned judges in the Court below did not approach the agreement from the proper standpoint. The proviso shows that what the Waterworks Company was so anxious to secure was their future monopoly. They did not wish to interfere with the rights of the De Beers Company, but they wished to buy up the concession which the De Beers Company had secured.

Mr. Justice Upington also concurred. It had occurred to him that the words in the sixth section might be held to absolutely prohibit the use of any other water than that obtained from the company, but on full consideration he had come to the conclusion that it would require very much stronger words to form such a prohibition, as against the natural rights of the company.

[Appellants' Attorneys, Messrs. Scanlen & Syfret; Respondents' Attorneys, Messrs. Van Zyl & Buissinné.]

KOHLER AND OTHERS V. BAARTMAN.

Mr. Rose-Innes, Q.C., moved to make absolute a rule *nisi* restraining the respondents from interfering with or using a certain stream of water flowing from the land Wolvekloof, in the district of the Paarl, to the farm of the applicants.

Mr. Tredgold for the respondents.

The order was granted, making absolute the rule *nisi*, from which the words "interfering with or using" were struck out. The respondents to have the right of claiming damages in respect of any injury which they could prove they had sustained by reason of the interdict. Costs to be costs in the cause.

BRAUDE V. VERDOES.

On the motion of Mr. Rose-Innes, Q.C., the executors dative of the defendant, who died

during the hearing of the action last term, were substituted on the record as defendants. The case to be set down in the ordinary course.

WOLFF V. SOLOMON'S TRUSTEE. { 1895.
Mar. 5th.

Mr. Searle, Q.C., applied on behalf of the defendant for leave to appeal to Her Majesty in her Privy Council from the judgment of this Court, delivered on the 22nd February last, in the suit between the parties, and for an order staying execution of the said judgment.

The Court granted the order; the writ of execution to be stayed for twelve months, with leave to apply for a further stay of execution.

LAWRENCE V. LAWRENCE.

Mr. Innes, Q.C., applied on behalf of the defendant for an order fixing an early date for the trial of the suit instituted against her by her husband for restitution of conjugal rights, failing which for divorce, the defendant being in a weak state of health, and liable to suffer injury if the hearing of the case be deferred.

Mr. Watermeyer appeared for the plaintiff, and consented to the granting of the order.

Order granted, fixing the 12th inst. as the date of trial.

IN THE INSOLVENT ESTATE OF GEORGE EDWARD MANDY.

Mr. Tredgold moved for an order to make absolute the rule nisi restraining George S. T. Mandy from removing any property now on the farm Pelion, near Lady Grey, and from alienating or disposing of any stock or produce removed from the said farm since the sequestration of the said estate.

Mr. Searle, Q.C., for the respondent.

Mr. Tredgold, after the affidavits had been read, applied for a postponement to the 12th instant, which was granted.

COMBRINCK V. COLONIAL GOVERNMENT.

Mr. Innes, Q.C. (with Mr. Graham), applied for an order making the award of the arbitrators in the matter between the parties a rule of Court, with costs against the respondents.

Mr. Juta, Q.C. (with him Mr. Giddy), applied on behalf of the respondents for a postponement to the 12th instant.

The Chief Justice, in granting the order for the postponement, said that the Government, before the 12th instant, might, on reconsidering the matter, come to the conclusion that there was no hope of successfully opposing the award being made a Rule of Court.

NOLTE V. REGISTRAR OF DEEDS. { 1895.
March 5th.
" 7th.

Transfer duty—Act 5 of 1884—Heirs—
Exemption—Registrar of Deeds.

Husband and wife bequeathed their two farms O. and B. to their seven sons for the sum of £1,400.

The testator died first and at his death O. was held by him under a quitrent grant, and B. was held by him on lease from Government.

A sum of money was taken out of the estate for the purpose of acquiring B. but the agent who was entrusted with the matter became financially involved and both money and farm were lost to the estate.

One son died leaving issue and a daughter was born subsequent to the making of the will, so that at the death of the testatrix there were living seven children and the issue of the predeceased son.

The executor of the estate obtained an order of Court sanctioning the conveyance of O. to the heirs for £700, the Court also authorised him to overlook in the transfer two of the six sons, who had neglected to adiate, and to transfer their shares to such of the other sons as might be willing to take them.

Subsequently two other sons declined to adiate and of the two remaining sons, L. and J., who adiated, L. accepted the four vacant shares and thus became entitled to five-sixths of the farm and J. to one-sixth.

The executor thereupon proceeded to pass transfer of the farm to L. and J. in the proportions of five-sixths and one-sixth respectively, and tendered transfer duty receipts showing an exemption allowed to each of them by the Civil Commissioner of one-eighth of the value (£700) of the whole farm.

The Registrar of Deeds took exception to these allowances by the Civil Commissioner and contended that J. was only entitled to exemption upon one-eighth of one-sixth of the value of the farm and L. to one-eighth of five-sixths.

On application being made to the Court the contention of the Registrar of Deeds was sustained.

This was an application under Act 5 of 1884, section 23, for an order declaring the applicants entitled to exemption from the payment of transfer duty as allowed by the C.O. of Fraserburg, in respect of certain landed property taken over by them from their parents' estate.

The following are the facts:

By their last will and testament Coenraad Barend Nolte and Anna Jacoba Elizabeth Nolte (born Burger), spouses, bequeathed to their seven sons their farms Boven Bleskrans and Onder Bleskrans, situate in Fraserburg, together for the sum of 1,400. The words of the will are as follows: "En nu als op nieuw beschikkende en alvorens ter verkeizing van erfenamen overgaande zoo verklaren wij testateuren te legateeren te vermaken en te bespreken zoo als wij legateeren vermaken en bespreken bij dezen, en wel na het overlijden van de langstlevende van ons beide aan onze zonen . . . de tot onze Boedel behorende twee plaatzen "Boven Bleskrans" en "Onder Bleskrans" gelegen in de afdeeling Fraserburg gezamentlijk voor desomma van een duizend vier honderd ponden sterling. Daar deze vermaking eerst na den dood van de langstlevende van ons beide van kragt zullen zijn geschied echter onder de volgende voorwaarde en conditie namentelijk dat geen van onze voornoemde zonen zijn aandeel in voornoemde plaatzen mogen verkoopen, verhandelen, verhuilen of verhuuren noch op eenige wijs in bezit of gebruik van een vreemde te stellen zonder toestemming van alle de mede bezitters wensche een of meer hunner zijn of zijne aandeelen in voornoemde plaatzen met langer te behouden zullen zij dezelve aan hunne mede bezitters moeten overlaten voor dienzelfde prijs welke hem of hun bij deze vermaking is komen te staan uitgenomen standhoudende verbeteringen zoo als sterk en stevig gebouwde huizen gemetzelde Muurkralen en Damm enzullen door twee van weerszijds gekozene mannen moeten getaxeerd worden en volgens Taxatie door hen aan wien de deelen overgaan, moeten worden uitbetaald"

The testator died first, and at his death Onder Bleskrans was held by him under a quitrent grant, Boven Bleskrans was held on lease from Government.

A sum of money was taken out of the estate for the purpose of acquiring Boven Bleskrans, but the agent (now dead) who was entrusted with the matter became financially involved; and as a result both money and farm were lost to the estate.

The testatrix died later; and at her death, although in terms of the will two farms were bequeathed as above for £1,400, there was only one available: viz., Onder Bleskrans. Moreover

one son had died leaving issue; and a daughter had been born subsequent to the making of the will—so that at the death of the testatrix there were seven children and the issue of the predeceased son.

On the 12th September, 1893, the executor obtained an order of Court sanctioning the conveyance of Onder Bleskrans to the heirs for £700, half of £1,400 the price of the two farms. The Court authorised the executor to overlook in the transfer two of the six sons, at Upington (who had neglected to adiate), and to transfer their shares to such of the other sons as might be willing to take them.

Two of the sons had thus neglected to adiate and after the order of Court two others declined to adiate. Of the two remaining sons who adiated, one, Lourens Rasmus accepted the four vacant shares—and thus became entitled to five-sixths of the farm.

The executor thereupon proceeded to pass transfer to Jan Hendrik Nolte and Lourens Rasmus Nolte of the said farm, in the proportions of one-sixth and five-sixths respectively, and tendered transfer duty receipts showing an exemption allowed to each of them by the Civil Commissioner of a one-eighth of the value (£700) of the whole farm.

In the case of Jan Hendrik the Civil Commissioner took the legated price of £700 as fixed by the Court and allowed him an exemption of a one-eighth thereof, he being one of eight heirs, viz.:

- (a) Six brothers.
- (b) Children of a deceased brother.
- (c) One sister.

In the case of Lourens Rasmus the Civil Commissioner allowed a similar exemption, he being one of eight heirs.

The Registrar of Deeds took exception to these allowances on the part of the Civil Commissioner, and on application being made to the Supreme Court to uphold the Civil Commissioner's allowance the Registrar of Deeds submitted the following report (admitting the above statement of facts:)

The Registrar contends that exemption was incorrectly allowed by the Civil Commissioner, that Jan Hendrik is only exempt to the extent of one-eighth of one-sixth of the value of the farm and that Lourens Rasmus is exempt upon one-eighth of five-sixths of the value of the farm—as they seek to have transfer registered in their names of one-sixth and five-sixths shares respectively.

It is admitted that if the six children to whom the property was bequeathed had applied for transfer *in equal shares* exemption to the extent of six-eighths of the value of the whole

property would have been allowed, their shares as heirs *ab intestato* in the property so sought to be transferred being represented by six-eighths. Further that the two children if taking over the whole property in equal shares would be allowed exemption to the extent of two-eighths of the value of the whole.

But it is submitted that exemption cannot be calculated upon the value of the whole property where it is acquired in unequal share as in the present case, nor would it have been had the applicants required only a one-sixth share each and the remaining four-sixths had been otherwise disposed of.

The object of both sub-sections 2 and 3 (of section 19) seems to have been to exempt children upon so much as represents their shares as heirs *ab intestato* in the property acquired by them whether a whole property or a share only in it.

In the *Case of Richards*, four of nine children acquired a four-fifth share in a property and claimed exemption on four-ninths of the whole property, but it was held by the Chief Justice that exemption could only be calculated to the extent of four-ninths of the share acquired by them, viz. four-fifths.

For duty purposes the case of applicants must be treated as two distinct cases: the acquirement—it matters not in what manner—by Jan Hendrik of one-sixth share, and by Lourens Rasmus of five-sixths share.

The principle decided in *Richards's Case* was that exemption was to be calculated with regard to the share acquired and not with regard to the whole property. This being so, it follows that where a part share in a property only is acquired or an interest in shares of different proportions, that exemption should be calculated upon the value of such part share or upon that of the different shares.

It is intended to benefit descendants to the extent of each one's interest in the property or share in the property acquired from the estate. A descendant therefore who acquires a sixth share cannot benefit to the same extent as one who acquires a five-sixths share.

It is held that to claim exemption in full all the heirs must acquire a property in equal shares.

The point raised in **Bouwer's Case* was of a different nature but the same principle was upheld there as in *Richards's Case*, viz.: that an heir was only entitled to claim exemption to the extent of his *ab intestato* share in the property sought to be transferred.

Mr. Rose-Innes, Q.C., for the applicants.

Cur ad vult.

Postea (March 7th).

The Chief Justice said: In this case we have considered the question as to the applicants' exemption from paying transfer duty. After carefully considering the Act, we are of opinion that the reading adopted by the Registrar of Deeds is correct. It is quite consistent with the previous decisions of the Court, and it is quite consistent with the terms of the Act. At the same time we would suggest to the Government that it would be well that some alteration be made in the Act, because there is certainly this inconsistency: that supposing there is only one heir in the estate and that heir takes over the property, he would be exempt from transfer duty altogether; while if there is more than one heir, his exemption from transfer duty is only in respect of the share transferred to him. The Court has tried to put a construction on the Act favourable to the applicants, but the wording of the Act is most unfortunate, and it is impossible to get over a construction of it which the Legislature never could have intended. The application must therefore be refused.

Mr. Justice Buchanan: I have looked at the Act carefully with every desire to come to a reasonable rendering of it, but have found it impossible to do so. The present wording of the Act makes its working most unequal and unjust.

[Applicants' Attorney, G. Montgomery-Walker.]

	1895.
COOK BROTHERS V. COLONIAL	March 6th.
GOVERNMENT.	" 7th.
	" 8th.
	" 11th.

Cession of territory—International law—
Private property—Concessions by barbarous potentate—Native customs—Paramount Chief—Treaty of 1844 with Faku—Sir Bartle Frere's Proclamation of 1878—Cession of Pondoland in 1894.

Before the cession of Eastern Pondoland to the British Crown, Sigcau, the Paramount Chief, made certain concessions to the plaintiffs of all the mineral rights in the country, the right to construct a railway, and the right to select a large extent of land as their own property, but, besides searching for graphite in a few spots, the plaintiffs did not act under their concessions, nor did Sigcau grant to them any particular land,

The native customs did not recognise such concessions, and, even if they did, there was no legal tribunal to enforce rights, but the Chief enjoyed despotic power to grant the rights if he had sufficient power to enforce them.

After the cession of the territory to the British Crown, and its incorporation with the Cape Colony, the Colonial Government refused to recognise the concessions, whereupon the plaintiffs brought an action to have their rights thereunder declared as against the Government.

Held, that the Court was not bound by the principles of International law to declare or enforce the alleged rights, which could not, before the cession, have been enforced against the then sovereign.

In the year 1878 the High Commissioner by Proclamation purported to depose Umquikela as Paramount Chief but took no steps to carry the deposition into effect, and continued in several ways to recognise him as Paramount Chief, and after his death, the Government officially addressed Sigcau, his son and successor, by that title.

The cession of the territory by Sigcau was founded upon his right to make such cession.

Held, that the Government cannot in this action dispute his title as Paramount Chief.

This was an action for a declaration of rights and for £5,000 damages, instituted by Messrs. Thomas and James Charles Cook against the Right Honourable Cecil John Rhodes in his capacity as Premier of the Colony, and as such representing the Colonial Government.

The following were the material allegations of the declaration :

On or about the 10th day of April, 1889, Sigcau, Paramount Chief of the Pondo nation, with the full knowledge, approval, and consent of his chiefs and councillors in Council assembled, and acting for and on behalf of the whole Pondo nation and in accordance with Pondo law and custom, granted to the plaintiffs, their heirs, executors, successors, and assigns, in consideration of a cash payment of £2,100 sterling, a certain mineral concession or lease in Eastern Pondoland for a term of ninety-nine years, at an annual rental of £600. Copy of the said concession or lease is hereunto annexed marked "A."

3. On or about the 24th day of October, 1890, Sigcau, Paramount Chief of the Pondo nation, acting as aforesaid granted to the plaintiffs, their heirs, executors, successors and assigns, in consideration of a cash payment of £1,720 sterling, a certain railway concession or lease in Eastern Pondoland for a term of ninety-nine years at an annual rental of £900. Copy of the said concession or lease is hereunto annexed marked "B."

4. On or about the 4th day of October, 1891, Sigcau, Paramount Chief of the Pondo nation, acting as aforesaid, granted to the plaintiffs their heirs, executors, successors and assigns, in consideration of a cash payment of £50, a lease of certain two pieces of land situate in Eastern Pondoland, each in extent not less than 3,000 Cape morgen, for a term of ninety-nine years at an annual rental of £6. Copy of the said lease is hereunto annexed marked "C."

5. On or about the 30th day of June, 1893, Sigcau, Paramount Chief of the Pondo nation, acting as aforesaid, granted to the plaintiffs, their heirs, executors, successors, and assigns, in consideration of a cash payment of £2,200 sterling, a lease of certain 160 square miles of land situate in Eastern Pondoland, together with certain other rights and privileges in the lease set forth, for a term of ninety-nine years at an annual rental of £400. Copy of the said lease is hereunto annexed marked "D."

6. The plaintiffs have duly carried out on their part all the stipulations and conditions in the aforesaid concessions or leases, and have regularly paid to the said Sigcau the rents reserved in the said concessions or leases.

7. Until the event referred to in the next succeeding paragraph the Pondo nation was an independent State, owning and occupying the territory known as Pondoland which included the aforesaid Eastern Pondoland, and was in no way subject to the government, jurisdiction, or control of Her Majesty the Queen in her Colonial Government, or of Her Majesty's High Commissioner.

8. The territory known as Pondoland was annexed to the Colony by Act No. 5 of 1894, which Act was duly promulgated on the 25th day of September, 1894. Prior to such annexation the Colonial Government had notice of the aforesaid concessions,

9. The plaintiffs submit that the Colonial Government, by virtue of such annexation, succeeded to all the rights and obligations of the said Sigcau under the aforesaid concessions to the plaintiffs.

10. The plaintiffs duly tendered to the defendant in his aforesaid capacity all rents due and owing by them under the aforesaid concessions

since the annexation aforesaid, and are willing and ready and tender on their part to carry out the stipulations and conditions in the aforesaid concessions towards the Colonial Government, but the defendant, in his aforesaid capacity, declined to accept the said rents, and wrongfully and unlawfully refuses to recognise the rights of the plaintiffs under the aforesaid concessions, or to allow the plaintiffs to exercise the said right.

11. By reason of the premises, the plaintiffs are entitled to a declaration of rights under the four concessions or leases hereinbefore referred to, and to damages for the defendant's wrongful and unlawful refusal to allow the plaintiffs to exercise their rights thereunder.

The plaintiffs claimed:

(a) A declaration of rights under the four concessions dated respectively the 10th day of April, 1889, the 24th October, 1890, the 4th October, 1891, and the 30th June, 1893, and an order that they are entitled to all the rights and privileges conferred upon them by the said concessions or leases.

(b) The sum of £5,000 damages, by reason of the defendant's wrongful and unlawful refusal to allow the plaintiffs to exercise their rights under the said concessions or leases.

(c) Alternative relief and costs.

The defendant in his plea admitted that certain documents, copies whereof marked A, B, C, and D were annexed to the declaration, were on the dates alleged executed by Sigcau, but he denied the other allegations in paragraphs 2, 3, 4, and 5 and the allegations in paragraph 7 of the declaration, and referred the Court to the terms of the documents.

With further reference to paragraphs 2, 3, 4, 5, and 7 of the declaration he said:

(a) That at the dates of each of the said documents, the British Government was the sole paramount authority in Pondoland.

(b) That without the consent of the British Government, which was never obtained, each of the alleged concessions or agreements was and is of no legal force or effect.

(c) That the alleged concession or agreements are contrary to the laws and customs of the Pondos.

(d) That the consideration or value given or promised by the plaintiffs to the said Sigcau or his successors is in respect of each of the alleged concessions or agreements in law wholly inadequate.

(e) That the said Sigcau and his councillors did not understand the meaning or effect of any of the alleged concessions or agreements.

(f) That the alleged concessions or agreements are in any case void for vagueness and

uncertainty, and says that for each and all of the said recited grounds the alleged concessions or agreements are bad in law.

The defendant did not admit that the plaintiffs had duly carried out the conditions of the agreement, and referred the Court to such proof thereof as might be adduced.

He admitted the allegations in paragraph 8, but denied the contentions in paragraph 9, and said:

(a) That before the annexation of Pondoland to this colony, to wit, on the 20th March, 1894, Pondoland was formally annexed to and formed portion of Her Majesty's dominions.

(b) That at the time of such annexation to Her Majesty's dominions or at the time of subsequent annexation to this colony no condition was made binding upon Her Majesty, nor is Her Majesty now bound in either her Imperial or her Colonial Government to sanction, recognise, or give effect to the aforesaid alleged concessions or agreements or any of them.

(c) That even if Sigcau had been Paramount Chief of the Pondos, and if the alleged concessions or agreements or any of them could have any legal force or effect (which the defendant does not admit) none of the said concessions or agreements have ever been carried out, and having regard to the terms and nature thereof they could give rise to only personal obligations, if any, attaching to Sigcau.

(d) That the alleged concessions or agreements purport to affect portions of Pondoland wherein there resided chiefs recognised by the British Government, who could not, according to native law and custom, be bound by the alleged agreements or promises to the plaintiffs.

He admitted that the plaintiffs tendered to pay him moneys said to be due under the alleged concessions or agreements, and that he refused to accept such moneys, and he admitted that he had refused to recognise or allow the plaintiffs to exercise any legal rights under any of the alleged concessions or agreements, but he denied the other allegations in paragraphs 10 and 11 of the declaration.

Issue was joined on these pleadings.

Mr. R. Solomon, Q.C., with whom were Mr. Sheil and Mr. Webber appeared on behalf of the plaintiffs; and Mr. Schreiner, Q.C. (Attorney-General), with whom were Mr. Juta, Q.C., and Mr. Giddy, were for the defendant Government.

Mr. Solomon, Q.C., after explaining the contents of the plaintiffs' declaration and the nature of the concessions granted to them by Sigcau, and, after reviewing the plea of the defendants, said that with regard to the *bona fides* of the plaintiffs he would say nothing more

than that, if the evidence he would bring before the Court were correct, then the concessions obtained from Sigcau were obtained in a perfectly *bona-fide* manner. Some time in 1888 the plaintiffs spoke to Sigcau with regard to the mineral concession. Meetings of councillors and other people living in Pondoland were called—sometimes as many as 5,000 people were present—and after discussion over and over again Sigcau agreed to grant the concessions, which were put in writing. Afterwards another meeting of councillors was called, and the agreement was interpreted to Sigcau, not only by plaintiffs, but by his own interpreter, and Sigcau was prepared to say that he thoroughly understood the nature of the rights granted to plaintiffs. After the first concession was granted on the 10th April, 1889, notice was published in the "Government Gazette" and in other Colonial papers, including the "Kokstad Advertiser." On the 6th September, 1889, a letter was written at Sigcau's request to the Chief Magistrate of Kokstad, Mr. Stanford, and to the Chief Magistrate of Tembuland, Major Elliot informing them that these rights had been granted under the mineral concession. Mr. Scott was at this time the Resident Magistrate in Pondoland, and early in 1890 Mr. Scott was aware of the railway concession. Mr. Scott told Sigcau as a friend that, although he had no wish to interfere, he should be careful as to what rights he was giving away in his country, when Sigcau replied that he thoroughly understood what he was doing. In the case of the railway concession the same procedure was gone through. It was fully discussed by Sigcau's councillors and people at properly called meetings, and notice of it was also published in the "Gazette" and in Colonial newspapers. The third and fourth concessions were both granted in the same way as the first two, but they were not published in the "Gazette" or in Colonial newspapers. From the plea which had been raised it appeared that the defendant would have to satisfy the Court that the plaintiffs, in obtaining these concessions, took advantage of the fact that they were dealing with savages, and that these people, in granting these rights, did not understand the extent and nature of the rights they were granting away. Then they came to the second issue, and that was the evidence as to whether these concessions were properly granted according to Pondo law and custom. No doubt a great deal of evidence would be brought before the Court as to the powers of the Paramount Chief in Pondoland with regard to the granting away of rights over the country—evidence much of the same nature as the evidence put before

the Court in the case of *White Bros. v. The Colonial Government*. By the evidence given in that case by Mr. Chalmers, the expert in native law, the real state of the law as to the powers of the Paramount Chief of Pondoland was practically described as empowering him to do what he chose so long as he had power to enforce his decisions. On important matters the Paramount Chief summoned his councillors. He consulted with them, but gave his own sole decision, and that decision was binding. That was practically the effect of Mr. Chalmers's evidence. The next issue raised is whether ———

The Chief Justice asked if Mr. Chalmers was an expert in native laws referring to Pondoland.

Mr. Solomon, Q.C. (continuing), replied in the affirmative. Mr. Chalmers had a thorough acquaintance with native laws and customs. Native law was pretty much the same from Pondoland to the Zambesi. The next issue was whether at the time these concessions were granted Sigcau was the Paramount Chief, or whether at the periods named Her Majesty the Queen was the sole Paramount Power throughout Pondoland, and that in order to render these concessions legal the consent of the Imperial Government was necessary. Evidence, principally obtained from Blue-books, would be put in to show that no such consent was necessary, and that Sigcau was the Paramount Chief of Pondoland at the time the concessions were granted. Mr. Solomon did not wish to trouble the Court with a history of Pondoland. He would, however, briefly state a few facts in support of his contention. On 23rd November, 1844, a treaty was entered into between the then Governor of the Colony and the Paramount Chief of Pondoland—Faku. That treaty was in such terms as to render it apparent that it was considered to be a treaty between two independent nations, and acknowledged Faku's paramountcy throughout Pondoland. There was not a word in that treaty with regard to the paramountcy of Great Britain over Pondoland, nor any stipulation as to any rights of the Imperial Government. The Chief Faku died in 1867, and up to the time of his death no authority of any kind whatsoever was exercised by the Imperial Government within the territory of Pondoland. Faku was succeeded by his son, Umquikela, in 1867. Before the death of Faku the territory was divided into Eastern and Western Pondoland, and these divisions were practically independent. The paramountcy of Eastern Pondoland was admitted, and these concessions were all within the territory of Eastern Pondoland, and did not encroach upon Western Pondoland at all. Matters remained in the same state

until in 1878, on the 4th September, a proclamation was issued by Sir Bartle Frere; and it was upon that proclamation that the defendants based their statement that Her Majesty the Queen was the sole Paramount in Pondoland at the time these concessions were granted by Sigcau. In that proclamation it was stated that loyal chiefs would be allowed to deal with the British Government as the Paramount in Pondoland, through the Resident Magistrates. That was the statement in the proclamation upon which defendants based their allegation. He, however, contended that that portion of the proclamation had certainly become a dead letter.

The Chief Justice: Would it not be more convenient, Mr. Solomon, if you were to postpone your argument until after the evidence?

Mr. Solomon, Q.C. (continuing), said he would only say with regard to this proclamation, upon which defendants based their case, that it had become a dead letter. The evidence would show that no authority was ever exercised by the Imperial Government in Pondoland after the issue of this proclamation, and that Umquikela was recognised as the Paramount Chief of Pondoland. He was succeeded by Sigcau, who was also acknowledged as the Paramount Chief of Pondoland. As such he was acknowledged by all the chiefs, and by those present when those concessions were granted. In 1885 a proclamation was issued proclaiming the West of Pondoland under the Protectorate of Her Majesty the Queen. In March, 1894, Pondoland was ceded to the Imperial Government, and the cession of Eastern Pondoland was made by Sigcau, and was made in exactly the same manner as were the concessions referred to in the plaintiffs' declaration. The most important issue in the case was whether Sigcau was the Paramount Chief, or whether the Imperial Government had such rights in Eastern Pondoland when the concessions were granted as to render it necessary that the Imperial Government should give consent to these concessions before they became binding upon Sigcau.

The following evidence was then taken:

James Charles Cook, one of the plaintiffs in the action, the other plaintiff being his brother, said that he first went to Pondoland in April, 1888. He in that year met Umhlangaso, Sigcau's Prime Minister, and he then went to Sigcau with the object of getting a mineral concession. He negotiated for this for about twelve months. Was present at meetings between Sigcau and his people. About a dozen meetings were held, and at one as many as 5,000 persons were present. They lasted four, five, and six hours a day. Before the first concession was put into writing, the concession was granted verbally.

When the concession was put into writing he took it, with a copy, to Sigcau. It was read over to him, and interpreted by witness's interpreter (William Garner), and he then said he would see his people about it. Sigcau asked the meaning of several words, and finally appeared satisfied, and signed it. William Barnabas, Sigcau's interpreter, was also present. The document was carefully read over and fully explained to Sigcau. Subsequently witness caused a notice of the concession to appear in the "Cape Government Gazette" of May 10, 1889. He also caused notice to be inserted in the "Kokstad Advertiser." He had to pay Sigcau £2,100 for the concession, and the rent stated in the concession was £600 a year. Paid the £2,100 to Sigcau, and the rent had also been paid since. Nothing was owing. In addition to the public notices mentioned, he believed that notice was also given by Sigcau, acting on advice, to the Chief Magistrates of Tembuland and Griqualand East. Mention was made of Mr. Girling's pretensions to similar concessions. A meeting was held to decide between witness and Girling's concession, and it resulted in witness's favour. On October 24, 1890, he got the "railway" concession. Before that he was negotiating for it for nearly twelve months, and they went on, by means of public meetings, in the same manner as those in the first concession. Sigcau always had his own interpreter with him. Was confident that the concession was thoroughly explained to, and understood by, Sigcau. The capital sum to be paid was £1,720, and the rent was £900 a year. Paid the £1,720 to Sigcau in gold, in the presence of Mr. Jones. The rent was paid up to the date of the annexation. In fact under all these concessions the rents had been paid up to the date of the annexation. On the 30th June, 1893, got the third concession of 6,000 morgen of land. That was obtained for the purposes of the railway. Generally speaking, exactly the same formalities were gone through in the negotiations and signing. £50 was paid down, and the rent was £6 per annum. The fourth concession was granted on the 30th June, 1893. Was about fifteen months negotiating for it, and the same formalities were gone through. The documents were repeatedly explained to Sigcau. Under this £2,250 was to be paid to Sigcau, and he paid it by instalments and got the receipt for it from Sigcau. Had tendered the rents since the annexation to the Colonial Government. Had got receipts for all the rents paid to Sigcau. Witness knew the boundaries of Eastern Pondoland, and all the concessions were within Eastern Pondoland.

Cross-examined by Mr. Schreiner : Captain Cooper was the agent of W. P. Taylor, of Johannesburg. Cooper was in Pondoland in 1889. Taylor was interested with witness in the concessions. Did not know that Scott wrote to Cooper warning him, before any concessions were given, against trying to get them. Witness's connection with Taylor began by Taylor offering to capitalise the concession. He ceded the concession to Taylor and was to get half the profits on the flotation. Cooper had nothing to do with getting the concession. Witness was frequently at the Great Place. Did not work much through Umhlangaso. Supposed Umhlangaso would get something from Sigcau, but witness had not offered him inducements to urge his wishes on Sigcau. Did not offer him £500, but he was to get something from witness for providing labour. Witness's brother was present at all the negotiations, but his brother came to Pondoland three months after witness. Remembered hearing before he (witness) obtained a concession that Girling had negotiated a concession from Sigcau to work copper near the Great Place, and that he should pay Sigcau £500. Girling drew out a concession on this, but it was never explained to Sigcau, and the concession signed by him was not what Sigcau had agreed, and Girling never paid a farthing of the £500. Sigcau was therefore free to give witness the concession ; he had not already given the same concession to Girling. Had never read Girling's concession.

The Attorney-General said he was not there to defend Girling's concession, but to show the circumstances under which the plaintiffs got their alleged concession.

Cross-examination continued : The mineral concession was promised to witness verbally long before Girling got his concession. Did not pay the money under such verbal promise. When Sigcau signed witness's first concession, did not know the particulars of Girling's concession. It was thrown on the table, but witness did not read it, and Sigcau said it did not matter, as Girling had not paid anything. Did not know anything about Nagel's concession, or whether it ran across the land (160 square miles) granted to witness by the railway concession. The 160 square miles were not surveyed. It was to be left to the Chief to point out, but the concession might state that witness had the power to choose whichever 160 square miles he pleased. Would now be prepared to accept any 160 square miles the Government awarded. Was not aware that White Bros. had paid Sigcau certain moneys in 1891 for a similar concession granted in 1877, the mineral rights over

Pondoland. Believed that no money was ever paid to Sigcau. Would not be prepared to say that all the names appearing on the concessions were those of important chiefs in Pondoland. Some of them he considered important chiefs. Xipu was an important chief, and he signed it. Thought Mr. Blenkinsop got Xipu's signature. Q'ypo was now dead and Gonyolo was his successor. Xipu was not the only person signing, who, besides Sigcau, had land and people. Umhlangaso was also an important chief. Would not go so far as to say that Sigcau and Umhlangaso alone could grant all the mineral rights. There were many chiefs in Pondoland who occupied land, and had cattle and people at their back. Of this class, Xipu and Umhlangaso signed the concession. Would be willing to go through the signatures on the mineral and railway concessions and state which of them were chiefs with land and people. Witness and his brother were now the only people interested in the concessions, with the exception of one gentleman, who had the option to take up a share in the mineral concession. The connection of W. P. Taylor, Dr. Pieterse, Mr. MacIntyre, and others had ceased. The concessions were amalgamated and a corporation formed, but the existence of that syndicate had now ceased. At the present time no complete concessions existed, but there was a proprietary syndicate of their own for the purposes of the railway concession. Mr. MacIntyre's letters written in 1894 to the Government were in his capacity as a member of the corporation. They were written with witness's cognisance. Had done mining and prospecting under the concessions. Was not aware that part of his mineral concession was over Xesibeland. If the document included Xesibeland, he, of course, would not wish that to be adhered to. Had done work near the coast. Had prospected in one place for about six weeks with Sigcau's knowledge. They found graphite, and were mining at that particular spot for anthracite coal. Sigcau never stopped the working at any spot, but he only asked witness why he did not come and try somewhere near the Great Place. Could produce a note of wages paid to men for the different prospecting done. Under his concession he contended he could go to the territory of any of the sub-chiefs and do whatever the concession allowed him to do without consulting any of the sub-chiefs. If Mr. Rhodes had not repudiated the concessions he would not have come now and asked the Colonial Government to confirm and ratify them. Had never said that so long as he got the railway he would not mind about the other concessions.

Re-examined by Mr. Solomon: The cession to Taylor and others was receded, and now witness and his brother owned all the rights. Witness had the proprietary right in every one of the concessions. Had seen Sigcau's notice in the "Kokstad Advertiser" repudiating any concession to Girling. Witness had nothing to do with Sigcau's putting that in the paper. Girling was now in the Transvaal and knew witness was bringing this action. With regard to Nagel's concession, Nagel obtained it on condition of giving Sigcau 10,000 rifles, which of course was impracticable. The Nagel concession was a swindle, and was never enforced. Regarding White's concession, knew that no money was paid for a long time to Sigcau, and would very much like to see White's receipt for such money paid. Some of the chiefs who agreed to them at the meetings did not sign witness's concessions. Did not know of any of the sub-chiefs not recognising Sigcau as the Paramount Chief. Some of the chiefs received part of the money witness paid to Sigcau under the concessions.

By the Court: Was nearly seven years in Pondoland altogether. All that time was spent in negotiating with the Pondos for the concessions. His intention was to get the 160 miles of land along the line of the proposed railway. W. P. Taylor up to a comparatively recent period had connection with the concessions with witness. Knew that Taylor got a Bill through Parliament for a railway in Western Pondoland. This was on another concession, on which there was less rent to pay than on witness's. Witness was interested in that scheme of Taylor's, but it had fallen through for want of capital. He paid some money to Xipu personally. That was because he had to ride out to him. Had not paid any money personally to any other chiefs.

William Garner, of the Forests Department, deposed that he was employed by the Cooks as an interpreter in their negotiations with Sigcau. Was interpreter at the negotiations for the first and second concessions, but was not present at the actual signing of the third and fourth. Barnabas, Sigcau's interpreter, was also present. Cook read from a document (the first concession), and both witness and Barnabas explained it to Sigcau. Many questions were put by Sigcau, who thoroughly understood it. Sigcau also thoroughly understood the second concession. Witness did not interpret the third and fourth concessions.

Cross-examined: Was educated at Salem and Fort Peddie up to the age of fifteen, since which time had lived amongst the natives. Knew their language and phrases well. Cook read the mineral concession, and witness translated

it to Sigcau. Umhlangaso and several others were present. (Witness, at the request of counsel, here translated parts of the concession into Kafir.)

Mr. Leary, the sworn interpreter, said that the witness had as "full consent," "sole and exclusive right."

Cross-examination continued: Sigcau understood fully what was in the concession, that he was giving the right over the minerals. With regard to the railway concession, Sigcau knew well what was meant by a railway. (Witness here rendered in Kafir what he had told Sigcau.)

Mr. Leary said the witness had said, "They want to consent to have the right to make a railroad."

Cross-examination continued: The Kafirs had a word for "railway," although they might never have seen one. (Witness here translated the fifth clause and other parts of the concession, dictated by Mr. Schreiner, to test his capacity as an interpreter.)

Mr. Leary translated the witness back into English.

He translated the word "canals" as meaning "a hole in a mountain."

Cross-examination continued: The Pondos called a piece of land an acre. So long as it was only twelve yards broad, they did not care how long it was. There were very many words in the concession that could not be translated into Kafir, but they had to be explained.

Re-examined: Explained the documents several times to Sigcau, and Barnabas assisted in interpreting them to Sigcau. Words that could not be translated literally were thoroughly explained to Sigcau before they were formally read to him for signature.

The evidence of William Buchanan Chalmers, taken on commission at East London, stated that he was well acquainted with the language, laws, and customs of the natives of Pondoland. The Paramount Chief of Pondoland had every power with regard to the alienation of land, but would summon his chiefs together, and after discussing the question in all its bearings, would arrive at a decision. The consent of petty chiefs to a concession would not be absolutely necessary, but might be obtained out of courtesy, but the Paramount Chief would be bound to summon his councillors together.

John Solomon Howston deposed that he had lived about seven miles from the Great Place in Pondoland for a little over eight years, but off and on had been in Pondoland all his life. Sigcau always sent for him to act as one of his councillors when anything important was on. Was present when the rail-

way concession was granted. Garner and Barnabas interpreted the terms of the concession to Sigcau, and witness also explained it to him. Believed that Sigcau thoroughly understood. All the tribes that it was necessary to have there were present. Knew the customs of the Pondos regarding the alienation of land. It was customary to summon the Amakwetshube and Amabella tribes, these being the most powerful. When the third concession was granted witness acted as interpreter for Mr. Cook, and Barnabas acted as interpreter to Sigcau. The document was read over and thoroughly explained to Sigcau. The same thing happened with regard to the fourth concession. Never heard of any petty chief refusing to acknowledge Sigcau as paramount. Had heard these concessions talked about at many places in Pondoland.

Cross-examined by Mr. Juta, Q.C.: Was not asked by Sigcau to pay a licence. Witness was exempted because he supposed Sigcau did not like to charge him rent. He did work for Sigcau. Had difficulties with creditors in East Griqualand, and then went to Pondoland and farmed there. Married a coloured woman in Natal. Assisted Garner in translating the documents to Sigcau. Barnabas, Garner, and witness all translated. (Witness was here questioned in detail as to how the different phrases in the concessions were conveyed to Sigcau.) Natives had no idea of the extent of land by terms; the country had to be pointed out. Was present at the signing of the third and fourth concessions. There were present, when the concession of the 160 miles of land was signed, several chiefs who had land of their own under the Paramount Chief Sigcau. Sigcau, he thought, could give away the 160 square miles of land running through the territories of sub-chiefs without consulting the sub-chiefs. The chiefs over whom Sigcau had such absolute power certainly had more than 160 square miles between them. Could not say if the chiefs would leave their territory at Sigcau's bidding without fighting.

The Chief Justice: Supposing the concessions are not enforced, would the Government refund the money paid to Sigcau?

The Attorney-General: The air would have to be cleared by a judicial decision before any negotiations on that subject could be entered into.

Cross-examination continued: There were some powerful chiefs who were not present at the signing of the concessions. The two chiefs of the tribes Amakwetshube and Amabella were, however, present, and their presence was all that was necessary. Could not say if Sigcau, with the

aid of these two chiefs, could turn out all tribes occupying the 160 square miles. Messengers were sent out by Sigcau four days before the signing to the different chiefs, but witness did not see them go; but many chiefs did not come to the signing in response to the notice. Did not know that he was on Sigcau's list as a "Pondo," to be paid by Her Majesty's Government on the cession of Pondoland. Was not to get anything either from Sigcau or Cook. (Witness would not deny that he was to receive consideration from Cook if the case succeeded.)

Re-examined: The Paramount Chief could at any time, he believed, make the petty chiefs migrate from their own to other lands. Sigcau was the most powerful and Paramount Chief.

Mr. Schreiner, Q.C., said that Siyoyo, an important witness for the defence, was ill in Pondoland, and applied that his evidence be taken on commission, appointing Mr. Warner commissioner.

Mr. Solomon, Q.C., said that the difficulty would be to get a gentleman to cross-examine the witness.

Decision on the point was deferred pending the hearing of the other evidence.

Sigcau then entered the witness-box, and in addition to the official interpreter was provided with his own interpreter. Sigcau said he was Paramount Chief in Pondoland up to the cession in 1894. (Blue-book quoted from, showing the terms of the cession.) When his father Umquikela died he (Sigcau) became Paramount Chief, and his election was notified to the High Commissioner. During the time he was Paramount Chief there were no chiefs in Eastern Pondoland who did not recognise him as such. He was besides the Paramount the strongest chief. His power was that he could do what he required to do. On important matters he consulted his councillors—one each from the Bala and Kwe-shubi tribes and the Pondos. Those were the men who settled all the things that came before him; but if he did a thing they had to agree to it. Siyoyo was one of his sub-chiefs, also Manunda, who was a relative of his. Nomvalo also was one of his councillors. He did not consult these latter; he only reported to them what had been decided by the first three. Knew the Cooks very well. Umhlangao was his chief councillor at the time, and he introduced the Cooks to him. They came and asked for the right to dig stones, gold, silver, and copper. He assembled all the men he had mentioned, and after three months they saw there was some truth in the matter. They delayed it for three months, being suspicious, but then they consented to what the Cooks wanted to do. Had frequent meetings with the

Cooks. After discussing the matters and so forth they brought him a document. He understood that the document was to signify his consent, which he gave with an open heart and a clear eye. The document was read to him three times. Barnabas was his (Sigcau's) interpreter. Barnabas, an educated man, was now dead. After signing the document there was a great meeting, at which Mr. Girling was present. Before that he had given a concession to Mr. Girling, but Girling did not do what he had promised to do according to the agreement. Girling did not give him the money he had promised. He paid no money at all. Therefore he gave the concession to Cook. Nobody else but Cook was to have it. He then caused a letter to be sent to Mr. Stanford and another to Major Elliot letting them know he had given the right to Cooks. After that the Cooks came to him again for something else. To give them a place near the place that was given to the Germans. He gave them a place near St. John's River. They wanted the place to build houses to live in. They came and asked for a railway shortly after they got the mineral rights. Gave them the right to the railway in the same manner as he gave them the right to dig. Gave them the right to build places, and to take the railway along from near the port of St. John's right through the country to the border. At the time he gave the railway he also signed a paper. It was read over to him. Barnabas was the interpreter. Had discussed it in the same way with his councillors as he talked about the first. Was paid money for the mineral rights. £900 was the first amount. Knew very well what he was taking that money for. They also paid him £800 for the railway. They continued to pay him money up to the time the Colonial Government took the country over. After he had given the railway they came again and asked for some land, and he gave them a piece. Something was said about cutting timber. He gave them the right to chop wood for any building they wanted. He thought about and considered this last concession in the same way as the others. He gave them the right to sell the timber they chopped in any part of his forests. That concession was discussed by his councillors, and the document was fully explained to him. He knew Mr. Scott, from whom he received a letter (produced). Barnabas used to read to him the letters he received.

Mr. Solomon handed in the letter, which was dated November, 1894, and asked Sigcau whether it was true he had granted the railway concession.

Examination continued: He got a letter from the High Commissioner about Mr. Scott, stating that Mr. Scott was appointed in order to bring about more friendly relations between the Pondos and the Colonial Government. He (witness) objected to Scott coming, but Scott said he was not a magistrate, but was only sent to see what was taking place. He replied by asking Mr. Scott to go to where Mr. Stanford was at Kokstad. Mr. Scott, however, went to Fort Donald. Up to the time of the cession there was no officer of the British Government residing in Pondoland, nor anyone having authority over him (Sigcau). When he gave his country over he gave it to Mr. Stanford, at the same time telling him about the concessions he had given to the Cooks. He told Mr. Stanford that any inheritance he had he could not give to the British Government. He told Mr. Stanford he wanted his inheritance, and Mr. Stanford said he would refer the matter to Government, but since then he had not received the money from the Cooks, and that was why he was in court.

By the Court: He told Mr. Stanford to tell the Governor he did not want to part with his forests, and still wished to receive his money, i.e., the money from the Cooks. He did not tell Mr. Stanford more because he knew all about the Cooks' concessions. He told Mr. Stanford that he wanted the money he was receiving from the Cooks to still come to him; also the forests. Mr. Stanford said he would see the Governor and give him a reply. He had never received such a reply.

Cross-examined by Mr. Schreiner: He did not know how old he was, and did not know of any arrangements made by Faku, who died while he (witness) was a child. He did not tell Mr. Stanford anything about his following where Faku had previously sent his cattle. He gave a concession to Nagel, the German. Nagel had never kept to the agreement. Nagel said he was going away to get his family, but he never returned. Nagel broke his agreement. He (Sigcau) said he would not recognise Nagel's claims. Umquikela gave a right to White to work minerals over that part of his country which the Government had taken away from him, and at present occupied by the Xesibes. He received money for that concession four years ago. He never, however, received a penny from Girling. After he gave the rights to the Cooks he held a meeting, at which Girling was present, but he would have nothing to do with Girling. [Mr. Schreiner produced minutes of a meeting held on the 6th September, 1889, the same day Sigcau wrote the letters apprising the Magistrates of Cooks' con.]

cessions, at which Girling was present.] He (Sigcau) asked Girling what he wanted there, and told him to go away. Girling offered him £800 before, but not on that day. On that day he would not have anything to do with Girling. He had not seen Girling since. [Mr. Schreiner read the minutes of the meeting to the witness.]

Cross-examination continued: Nothing was said by Girling on that day about £2,000, nor did he (Sigcau) say anything to Girling about Western Pondo-land. He (Sigcau) signed Girling's document, but Girling had not paid him threepence. He came first with £800, and he refused, and told him to go away. Girling came again, but he would not have anything to do with him, and he gave the rights to Cook. He signed altogether four documents for the Cooks. No. 1 was for minerals, No. 2 for railway, No. 3 for ground where the Germans had been—160 miles—a place where the railway came out—to build as much as they liked—a fair-sized space where the railway began, and another fair-sized space where the railway ended—no more. Also a fair width about as wide as the Court-room, for the railway to run along. There were two building places, one at Nagels and one at the boundary, and the railway went from one to the other. A "mile" was the width and length and breadth of it.

The Chief Justice: He knows what a square mile is.

Cross-examined: It would take him the whole day, and the next day as well, to ride round the 160 square miles.

The Chief Justice: It would be a ride of about fifty miles, and it would take him about the time he states.

Cross-examination continued: Indicated the place to the Cooks, but did not take the Cooks over it. Three tribes lived on the ground. He meant that Cooks should live there with the people. The Cooks were to come and live along with the Pondos. He meant the Cooks to come to live and work there with his people. If the Cooks went over the sea they would have a right to send other people to dig. If the Cooks went over the sea he would let them send other people to dig if he (Sigcau) approved of them. Cook could send people in to work according to the agreement. Cook could send the Xesibes into his country to work if he liked. He put the money he received from Cook into his own pocket and to help anything that happened in his country. Had given Cook the rights for money received. Cook could decide what he would do so long as he paid the money. He was the greatest of the Pondos, and could move

all other Pondos to make way for Cooks' people if he liked. But no other Pondos could move him.

The Chief Justice said he did not see how the concession implied that the Pondos were to be turned off of the land granted. He read the concessions in the light of the Pondo customs at the time.

Cross-examination continued: If the Cooks found gold in the Great Place they could come and dig there. He would then move off to another place, because it was the agreement. 100 years would be the time when his grandchildren would be eating food. His children were very small yet. The eldest was just going to school. Did not count the years—it was not his custom. Regarding the payments he received for the different concessions, he got £900 for the first and £900 for the second, and £400 for the third. He was also to get money each year. When he went to Mr. Stanford at the time of the cession he told Mr. Stanford he wanted his inheritance. Mr. Stanford promised to tell the Government, but he (Sigcau) had never received a reply. He did not know why his country was taken away from him. He told Mr. Stanford he wanted to receive from him the £2,200 he had received from Mr. Cook. He had now come to court to get his money which he parted with. He wanted to know why he did not get it, and therefore had come there to see about it. Gave Mr. Hargreaves £500 to take care of for him, and £100 besides to educate his children with. It was not to be given to the Cooks, because he (Sigcau) thought he had done wrong in taking it from Cook. Mr. Hargreaves had since given him the £500 back. Only gave Mr. Hargreaves the money to keep for him. Did that because he was afraid that otherwise he would spend it.

[A map was here handed to Sigcau.]

Cross-examination continued: Pondoland was not like that; it was much bigger.

Mr. Schreiner here read the names of chiefs with land and people under them, Sigcau commenting on the importance of each. Some of these were present at the signing, and others he told after the signing. Mr. Stanford had consulted him as to a list of chiefs who should be paid in connection with the cession of the country. He thought the British Government should give these something. As to whether he gave these chiefs any portion of the money received from Cook, it was the custom of the chief to take such money for purposes of the country. [Witness was here cross-examined with the view of eliciting what he

knew about the concessions.] Cooks were to get all minerals, and stones, and coal. They could chop all the forests as much as they liked. It was no use asking him anything about the cession to the British, because he was still trying to find out why his land had been taken from him; he had done nothing. It was understood that nothing would be taken from them. Mr. Stanford said they would not be turned out; his people were to go on as before, and he was to govern them, but they were not to break the laws. Knew Mr. Garner, but he did not read the documents to him: Barnabas did that. Garner was on the Cooks' side as interpreter, and Barnabas was on his side. Garner was present at the deliberations just like anybody else. Houston was a man he trusted in, and occupied a position in the tribe. He did not pay any licence like other white men. Houston was also present at the assemblies. Did not remember granting any land to a white man called Le Fleur, nor any concessions given to white men in what he called the German country. He (Sigcau) could move his people from place to place to live just as he liked.

Re-examined: The chiefs in Pondoland occupied land with his consent, and he could move them. The chiefs on Mr. Stanford's list (to receive consideration on the cession) all acknowledged him as Paramount. All the chiefs who were not present at the granting of the concessions or did not sign, knew of the concessions, and they received cattle or other presents. There was not a single chief in the country who did not know of the concessions to Cook. Handed Mr. Hargreaves the £500 shortly after he (Sigcau) had the quarrel with Umhlangaso. It was not meant to be paid to the Cooks. It was only for safe keeping. Mr. Hargreaves tried to induce him to break his concession with the Cooks, but he (Sigcau) refused to do so. The concessions were for ninety-nine years. Nquilisio, the Chief of the Western Pondos, was sent for to attend the meetings, and he sent a representative to the meetings.

By the Court: Remembered the day when he signed the document and gave it to Mr. Stanford, giving his country to Her Majesty the Queen. Before signing that Mr. Stanford did not tell him the concessions he had made to Cook would not be recognised. He (Sigcau) told him first they would have to be kept and Mr. Stanford said he would tell his Government about it. Mr. Stanford did not tell him before he signed the cession that the concessions would not be recognised. Asked if Mr. Stanford had so informed him he (Sigcau) would not have signed the cession of his country to the Queen, Sigcau replied that he signed the

cession believing that the concessions would be recognised. He felt obliged to sign the cession. They pressed him into it.

Donald Strachan, at present a resident of East Griqualand, said he had been to Pondoland on several missions from the Government. After Umquikela had been deposed as Paramount Chief by the High Commissioner, he was looked upon more than ever by the people as the Paramount Chief. They regarded him as a sort of martyr. Witness was well acquainted with Pondo laws and customs. The power of the Paramount Chief in Pondoland was absolute. He was a despot if he chose to exercise his power. It was a rule for the Chief to consult councillors on important matters, but on very special occasions only those who were connected with the reigning family were called into the council. With regard to Siyoyo, he was often turned out of the councils, because they suspected he had a leaning towards the Government. There was no rule as to the number of councillors to be present on important occasions. He (witness) had settled important matters with the Chief when only two or three had been present, and they sometimes men of no consequence. The following belonging to Sigcau's Great Place was numerically much greater than that of any other clan in Pondoland. As an instance of Sigcau's authority, he turned his chief councillor Umhlangaso out of the country. To do so he called every chief in Eastern Pondoland to his assistance, and they turned out willingly.

Cross-examined by Mr. Schreiner: Witness entered into details of Pondo history for a number of years past, in the course of which he stated that Nquilisio had recognised the paramountcy of Faku's house.

Mr. Justice Buchanan observed that the history which was being referred to in the evidence was like the history of the Scottish clans 300 years ago.

Mr. Schreiner asked the witness whether as a native expert he asserted that a native chief, paramount but under protection, could give to white persons anything he chose in his territory.

Witness: The paramount chief has the power if he wishes to exercise it.

The Chief Justice observed that the witness would have difficulty in answering until Mr. Schreiner explained what was meant by protection.

Mr. Schreiner: I mean by this protection a protectorate which every Court in the British Empire will recognise. That is a protectorate established by treaties.

Mr. Justice Upington: I attach very little weight to protection. What I should like to ask the witness is whether as an expert in native law he has ever known an instance of a native chief, even with the assistance of his councillors, giving away concessions of this large description, and whether he thinks that is according to native law.

Witness: It is quite a new thing, my lord. It has never been known before.

Are such grants foreign to native ideas altogether?

Quite so, we have educated them up to it.

In the course of further cross-examination the witness stated that the Imperial Government since the proclamation of 1878 deposing Umquikela, had allowed the Pondos to carry on their old customs of war, smelling-out, &c., and that they had done nothing to support that proclamation.

Re-examined: After the proclamation Umquikela had more power than before, and since that proclamation the Colonial Government when dealing with the Pondos had dealt with Umquikela, and Sigcau after him. They made treaties with Umquikela after the proclamation.

Mr. L. F. Zietsman, attorney at Kokstad, stated that he kept the minutes of the meeting which was held at the Great Place to consider the relative rights of the Cooks' and Girling's concessions. The discussion lasted something like ten days, and the concessions were gone over clause by clause. The Cooks maintained that Girling had included in his concession considerably more than what the Paramount Chief had given him, and that for that reason his concession was rightly rejected by the Paramount Chief, and a subsequent concession given to them, the rights in which they strictly adhered to. The railway concession was brought up at the time of the meeting, but Sigcau said he could not deal with that, as the people had not been given notice of it.

Cross-examined by Mr. Juta: The minutes only referred to the proceedings of the last of the ten days. If he had taken the minutes of the doings of the entire ten days, he would have had to have written a book. He had heard Sigcau say in his evidence that the reason Girling's concession was rejected was because Girling had paid nothing.

Umhlangaso, late Prime Minister to Sigcau, was the next witness examined. He said that at present he lived at Kokstad. At one time he was chief councillor to Umquikela, who was his uncle. On the death of Umquikela he became chief councillor to Sigcau, and continued as such until he (Umhlangaso) went

into rebellion in 1891. Since then he had not seen Sigcau until the present time. He remembered when the English took the port of St. John's, and that Mr. Strachan came to him and told him that Umquikela was not to be Paramount Chief any more. Umquikela, however, continued to be Paramount Chief in Eastern Pondoland until the time of his death. All the other chiefs in Eastern Pondoland acknowledged Umquikela as the Great Chief. The Great Chief could do everything he liked, but he first consulted certain councillors. When a thing was done without the councillors, word was sent to them that it was done, and they consented. He introduced Mr. Cook to Sigcau. Mr. Cook wanted permission to dig about the country for stones. Altogether the Cooks were seven months running to and from Sigcau's kraal about the matter. They refused at first to grant the concession, thinking that the Cooks wanted to take the ground away from them. During the discussions witness said the Government were bound to take the ground some day, and that the best thing to do was to work the ground while they had it. With regard to the railway concession, witness knew at the time it was discussed what a railway was, and explained it to Sigcau. He was not in rebellion against Sigcau at that time.

Cross-examined by Mr. Schreiner: At the meeting at the Great Place, Sigcau said to Girling, "Your agreement has come to an end. You have broken your word, and the agreement has come to an end."

In reply to the Chief Justice, witness also stated that Sigcau said to Girling, "I find in your concession you mention Pondoland East, Pondoland West, and the Rode. It is not so. You want to make me quarrel with other people living in those places."

By Mr. Schreiner: You had £300 a year promised you by Cooks for your consent?—For my work; not for my consent. Continuing, under cross-examination, the witness said in connection with Nagel's concession that he went to Natal and saw Nagel there, but that he signed no document in Natal. The document was signed at the Great Place.

In reply to the Chief Justice, witness said that if the document stated that it was signed at Durban it was a mistake.

In further cross-examination, Umhlangaso said he had nothing from Nagel for his services in the matter. He paid the money himself for the education of his son and nephew. He had not seen Nagel since he saw him in Natal, and if Nagel came back now he would say the time for the concession was over. Nagel had no

right to hand over the concession to anybody else. If Cooks won the present case he expected to obtain payment from them. The money he had received from the Cooks was not paid because he had been Prime Minister to Sigcau, but because of the work he had done. Sigcau wanted to give him some of the money he received from the Cooks, but he (Umhlangaso) told Sigcau to give it to some of the other councillors.

Mr. Schreiner said he was trying to show by the cross-examination that in each case Umhlangaso was the central figure who had worked to the detriment of the Pondos.

In reply to a question from the Chief Justice, Umhlangaso stated that he obtained £300 from the Cooks because he was the man who explained matters to the Pondos so that the Cooks could get their concessions.

Cross-examined by Mr. Schreiner with regard to the circumstances of his rebellion, Umhlangaso said he wrote to the Natal Government asking for assistance to establish a peaceful state of affairs in Pondoland, and also to the Cape Government.

Mr. Schreiner: Did you ever ask this country for help?—Yes.

Mr. Schreiner: They knew better.

Rev. Oxley Oxland, curate-in-charge of St. Augustine's Church at Durban, deposed that he was formerly in Pondoland. After Sir Bartle Frere's proclamation in 1878 he was appointed first British Resident. Previous to that was in Pondoland for five years. He was Resident from 1878 to 1883, when the abolition of the office took place. He was present on the Active with Lord Chelmsford when the landing at St. John's River was effected. An official map (produced) was given to him on being made British Resident, showing the limits of the proclaimed territory. As Resident he was the eyes, ears, and mouthpiece of the Government. Amongst the Pondos themselves he exercised no authority whatever. He lived within ten miles of the Great Place. He resided there till about February, 1882; then the offices of magistrate at Port St. John's and British Resident were combined and he went to live at St. John's. When he had to treat with the Pondos he did so through Umquikela; there was nobody else to deal with. He treated with Umquikela as the principal Chief of the Pondos. His orders were that Umquikela was deposed. He knew that in spite of the proclamation of deposition, Umquikela was even more the Paramount Chief than before. Ensuing on the proclamation there were two chiefs and one headman who offered to go under the British Government, Jojo, Nota and Siyoyo.

Witness here related the circumstances under which Siyoyo and Nota went back to the paramountcy while Jojo remained under the British Government.

Examination continued: As far as the proclamation was concerned the Xesibes were the only tribe affected that understood the Pondo language. No power whatever was ever exercised by the British Government in Eastern Pondoland over the Pondos. The British subjects there were never protected by the British Government. As an instance, one Growder established a saw mill, and got into a difficulty with a petty chief. Growder came to witness for protection, and witness told him he was subject to the Pondo Chief. He apprised the Government of his action, and the Government approved, and that would appear in the Blue-books. Sigcau was recognised as Paramount Chief by the Government, and also by the chiefs, not only in Eastern but in Western Pondoland. He knew the Cooks slightly. The only way he had been connected with the concessions was that he, at the request of W. P. Taylor, had made certain payments to Sigcau. He discussed the terms of the mineral concession with Sigcau. Sigcau thoroughly understood the concession, and told witness that there might be a difficulty if Cook went to dig for stones at kraals. He knew as much about the Pondos as anyone who had lived with them for twenty-one years could, and he said emphatically that the power of the Paramount Chief was absolute. Sigcau was also more powerful than any of the other three tribes put together. His driving Umhlangaso out of the country was an instance of this.

Cross-examined by Mr. Schreiner: His letter appointing him Resident was given to him in 1878. [Counsel here read the letter of instruction given by the Government to witness.] That was the letter he received, but he denied that he was ever in a position to carry out the instructions. They were written by a person who had no knowledge of the country. [Counsel here quoted from the Blue-books, showing the witness's reports to Government.] Shortly after he was appointed there was a meeting at the Great Place—on the 2nd October, 1878. [Witness's report of the meeting was here quoted from.] He would adhere to what he reported at that time. He would simply reiterate what he had stated before in the box, that the sovereignty of the Queen was never admitted by the Pondos. He adhered to what he reported then. The sovereignty referred to only referred to the coast, and not to Pondoland. He was not turn-

ing round now by any means to the Pondo view of the question after having filled the office of British Resident. What Mr. Schreiner had read was simply his report of what took place at the meeting at the Great Place. The British Government had no authority at that time, but he was obliged, according to his instructions, to try and bring the Pondos into accord with the Government. He told the Pondos that what had been done—the deposition—was irrevocable, but the Government afterwards made him a liar. Nquilliso was never independent, but was under the Paramount Chief.

Counsel read a letter of 3rd August, 1878, from Umquikela's secretary to the Government that he had consented to a British Resident, but there was no admission in that letter of Umquikela's submission. With regard to his (witness's) reports to the Government, he acted in pursuance of his instructions from the Government that the action taken was inviolable. [Counsel continued to quote reports of witness.] He still stuck to his opinions expressed in the report. As an officer of the Government he told Umquikela what he had to tell him, that the British Government was the Paramount authority. He was the medium of communication between Umquikela and the British Government. He reported that "under the new *régime*" matters were improving in Eastern Pondoland. That report was quite true. He had a meeting with the Pondos to discuss the boundaries of Jojo's territory. [Witness's report to Government of this meeting was quoted by counsel]. The gazetted proclamation, according to report, was shown to Umquikela about the time that Mr. Strachan conveyed the message. Umquikela never pleaded ignorance of the fact that he was not aware of the terms of the proclamation deposing him.

The Chief Justice said that at all events there was plenty to show that the British Government attempted to depose Umquikela.

Mr. Justice Upington said that one difficulty in his mind was why the British Government wanted the formal cession at all in 1894 if the country was previous to that under its paramountcy.

Cross-examination continued: He was with Mr. Taylor when Mr. Taylor offered an inducement to Mr. Stanford to join the Cook Synicate

Re-examined by Mr. Solomon: He had not a farthingsworth of interest in these concessions. While he was British Resident in Pondoland he did nothing to restrict the power of the Pondos. He was simply there as a Consul.

By the Court: The communication made to Mr. Stanford by Mr. Taylor he did not remem-

ber the exact terms of. It was in 1890 or 1891. Mr. Stanford was then Chief Magistrate at Kokstad, and had nothing to do with Pondoland. Something was said that passed away at once. He was not, directly or indirectly, interested in any way whatever with the Cooks' concession, either in the past, present, "or future." He made the payments for Taylor purely as a friendly act. He was not aware that at that time all messages about Pondoland to the Government went through Mr. Stanford. He had never himself acquired land in either Eastern or Western Pondoland, but he had acquired land at Port St. John's, British territory.

This closed the evidence for the plaintiffs.

EVIDENCE FOR THE DEFENCE.

For the defence, Mr. Schreiner called

Walter Ernest Mortimer Stanford, who deposed that he was Chief Magistrate of East Griqualand, which now included Eastern Pondoland. He had spent all his life, with the exception of four years, in connection with native affairs. He was a member of the Native Laws Commission, and was as familiar with the Kafir language as with English. He knew Mr. Thompson and Mr. Brownlee, they were well qualified to interpret the language spoken by the Pondos. He had considered Cooks' concessions. There was nothing in connection with native laws and customs to justify the granting exclusive rights of that nature. Assuming Sigcau to be Paramount Chief, the concessions were not provided for by native laws and customs. The whole of the Pondo system was based on communal occupation of land. Alienation was unknown to them. According to the system of working, the Paramount Chief could not do such a thing without consulting his people; but if the Paramount could enforce his will with an army he could act as a despot. He would not arbitrarily remove a tribe from one place to another. It would be entirely foreign to the Pondo system to oust natives from their land in order to put white men there. He had made out a list of those chiefs who had land and people and were important chiefs in Pondoland. If the names on the concessions were intended to represent the important chiefs he would say the intention was not carried out. He could not say if those chiefs who did not sign them were only Pondo subjects and not Pondos by blood. From his experience of native custom, the chiefs had to be fully represented at a meeting to decide any question, and a meeting was delayed pending the arrival of all

chiefs. This was done on such a question as a deviation of a road. He considered that the chiefs on his (witness's) list would all be summoned on any important question. He doubted if the Paramount would decide the question without them. It would depend on the Paramount's power; it was always a question of power. Sigcau as an individual chief had a stronger following than any other chief. With reference to these concessions, he thought that Sigcau could never have intended them to be put in force. Cook might come and dig at the kraals for instance.

The Chief Justice said that the Government might give the right to someone to do that now.

The Attorney-General said Government could not. Government had pledged itself over and over again to the Pondos to respect their holdings.

Examination continued: "Sole and exclusive" would be a term not to be explained to the Pondos. Mr. Taylor approached him on the subject of the concession with a proposal through Mr. Oxland. At that time Mr. Scott, he thought, was the medium for Pondoland messages to the Government. Mr. Oxland was then, as at present, a personal friend of his, and he at the time thought there was more blame attaching to those behind Mr. Oxland than to Mr. Oxland himself. Regarding the status of those natives who had signed the concessions, a few were chiefs and a few were councillors. Many of them, however, were of no standing at all. Sigcau was told by Major Elliot at the time the deed of cession was signed how his country would be governed, but witness told Sigcau that he did not believe the British Government would recognise the concessions at all, and that if the Government did recognise the concessions, being of land, the rents would not go to him (Sigcau), but to the Government. Sigcau said he would sign the cession, but would urge his claims on the Governor, and shortly after that Sigcau spoke to Mr. Rhodes about the concessions.

Mr. Solomon objected: Sigcau was not cross-examined on this point.

By the Court: He held out no hopes to Sigcau that the concessions would be recognised, but told him the Government would decide.

The Chief Justice said that was in accord with Sigcau's evidence.

Examination continued: Sigcau signed the deed of cession, and made his concessions a matter that he would urge on the Government. When the amount was fixed, to be paid to Sigcau by the Government, Sigcau knew he would not get the rents under the concessions. He told Sigcau that the forests would

go with the land, and Sigcau said he would represent the claims to the Government. The basis of the cession was that the Pondos' holdings of land should be upheld. This referred only in his evidence to the mineral and railway concessions; the third and fourth concessions turned up afterwards, and at the time of the cession witness was not aware of them. The Germans came in and lived in Pondoland under Sigcau's concession, but the Pondos allowed their cattle to wander over their land, and the Germans went away one by one. The last two Germans who remained quarrelled, and Sigcau took a rifle from them to prevent accidents. That was the last thing the Germans possessed, he thought.

Cross-examined by Mr. Solomon: He received a notice from Sigcau (and also saw it in the "Kokstad Advertiser") that he had given the mineral concession to Cook. He could not remember whether he notified the news to the Government or not. Frequently he saw the Cooks after that, but made no communication either to them or to Mr. Oxland about the invalidity of these concessions. Before the deed of cession was signed Sigcau told him he had given the mineral and railway concessions. He said he had given rights to dig and to build a railway. He thought Sigcau, with the exception of a few technical expressions in the documents, would thoroughly understand what he was giving away in the concessions.

By the Court: Before the cession was signed Sigcau seemed anxious that the money to be paid under the concessions should still come to him.

Cross-examination continued: Regarding the meetings of the Pondos, Barnabas would be fairly well qualified to give, as an interpreter, a fair general idea of the documents to Sigcau, with the exception of technical or legal terms perhaps. His opinion was that the mineral concession was not valuable. Mr. Chalmers was an acknowledged authority on native customs, also the late Mr. Brownlee and Mr. Strachan. The Paramount Chief had the absolute power over the land. If he chose to act unconstitutionally he could do so if he were strong enough to carry out his wishes. Therefore, in important matters he would wish to consult chiefs who he might suppose would resist. He did not think all the chiefs in Pondoland might have known of these concessions. The fact that some did not sign them might not imply that they did not know about them. On the occasion of the Nots Kraal treaty being made all the important tribes were present, although all the chiefs did not sign. All who were present would not

necessarily sign the actual document. Therefore, it was possible that other chiefs besides those signing Cook's concessions were present at the signing. Any matter discussed publicly would travel right through the country. He would say that if Mr. Cook's evidence was correct, the news of these concessions being negotiated for or given would travel through Pondoland. If no petty chief came to the Great Place to protest it would not signify that they agreed to them. Most of the chiefs in Pondoland acknowledged the higher rank of Sigcau, and looked upon him as the highest power in the country, although they knew there was a higher power coming on. Sigcau had sufficient power to enforce his will against any other one chief in Pondoland. From his experiences in travelling through Pondoland he had found that the tribes generally did not assent to these concessions; some of them seemed to think it was a private affair of Sigcau's and Umhlangaso's. Sigcau, if deciding a question affecting outlying tribes, would, according to custom, discuss it with those tribes. He was of opinion that the mineral concession was contrary to Pondo law and custom. He could not say if the Pondos had heard of such concessions being granted in other countries. He supposed that Sigcau would know something about diamond-mines. There were various proclamations by the British Government, but he always treated with Umquikela (or Sigcau afterwards) as sole Paramount Chief in Eastern Pondoland, and nothing in the way of asserting British authority was ever done but through him. He was the only chief to deal with.

Re-examined by Mr. Schreiner: He could not say if Pondoland lay in the coal measures or graphite. Mr. Chalmers was never in Pondoland as far as he was aware. Sigcau had no legislative or judicial power at his back. He had to satisfy his people or he would lose his power. Although matters publicly discussed travelled through Pondoland they frequently kept matters done at the Great Place very secret. The custom was that the natives themselves enjoyed community in land, but when the whites came in they had the exclusive right to any land given to them. The concessions, he believed, were detrimental to the Pondos, whom he thought had been deceived. They were what would be called wicked documents. Many leading men in Pondoland had said that they did not know about the concessions.

Re-examination continued: When he said in cross-examination that Sigcau was Paramount Chief he meant that he was acknowledged by the sub-tribes as the highest power. In Tembu-

land they regard Gangelizwe as Paramount Chief, notwithstanding the annexation of that territory. The term "paramount" related to the position of the Chief as to the sub-tribes.

By the Court: Gangelizwe gave certain concessions which were recognised by the Government after annexation, but there was no alienation of land. He was doubtful at the time of the cession whether they would recognise Sigcau's concessions to Cook. Supposing there had been no cession, his belief was that no work would have been done under the concessions. The German concession was an illustration. Sigcau himself not having consulted chiefs with regard to the concessions those chiefs would have resisted any work being done, and then Sigcau would not have enforced them, although he might have received all moneys due from Cook. He did not regard these concessions in any other light than just a scheme on the part of Sigcau and Umhlangaso to get money, and that they never could have been worked. Sigcau and Umhlangaso would simply have taken the money from anybody else who came along. It was just a scheme on their part. Sigcau would not have had the power to allow these concessions to be worked, as the people would have been against them. His power would go as far as he could enforce it. If he had told Sigcau point blank that the concessions would not be confirmed he would still, he believed, have signed the deed of cession. Sigcau looked upon the concessions simply as a question of bargaining.

Mr. John Templar Horne, Surveyor-General, said he had examined the different concessions, four in number. From the railway concession it was impossible to locate where the railway was to go. Therefore, the claim for land for the terminus of the railway and the 160 square miles could not be located. Government had purchased a plan of Pondoland from a surveyor at St. John's River, from which the official map (produced) had been made. The railway concession was not confined to Eastern Pondoland. A map prepared in 1884 for Government purposes had apparently been used by the Cooks, and the ground claimed included some of the Xesibes' country annexed by the British Government since that map was prepared. The fourth concession to Cook would apparently cover 500 square miles of land.

Cross-examined: The area of Eastern Pondoland would be more than the half of the whole of Pondoland, which was about 2,320 square miles.

Mr. John Healey Scott deposed that he was at present assistant magistrate in Tembuland. He came to South Africa in 1859. He

had since then been associated with the natives. In 1876 he entered the Government service, and had to administer native laws and customs with the assistance of native assessors. In 1888 he returned to Pondoland and remained there until the annexation. He had made native law a study, and quite agreed with Mr. Stanford's view. In his opinion these concessions were not valid by native law. A native would not understand the term "ninety-nine years," or any other period of years. They counted by months, and after a year or two were quite "lost." The power of the Paramount Chief would be qualified by the assent of his people. There was in the native mind a great distinction between an act of the chief which was arbitrary and an act which was in accordance with right. In his opinion Cooks could not have violated a single native right involved in their concessions except force was used, and in that case Sigcau would not have been strong enough to enforce them. On one occasion when a meeting was to be held at the Great Place, on Government business, Sigcau postponed the meeting, because he said the Pondo chiefs had not arrived. He saw the Cooks frequently at the Great place. Cook complained to him that he could not get Sigcau to the point. Faku himself made Nquilisio independent years before 1876. That was however never fully recognised in Eastern Pondoland. He was British Resident, and was present when Sir Henry Loch visited Sigcau in 1891. The position taken by Sir Henry Loch with Sigcau was that he, as the supreme chief, had come to visit the country. The court bard was there and he wanted to sing the praises of Sigcau in the presence of the supreme chief, but witness stopped him. This involved a question of precedence of Sigcau over Sir Henry Loch which could not be tolerated.

Mr. Justice Upington: Was the bard anything like a Scotch piper?

Cross-examined: Sigcau ordered him out of the country and he went to a place outside Eastern Pondoland. Witness never exercised any authority in Eastern Pondoland as British Resident; never attempted it. The proclamation of Sir Bartle Frere of 1878 deposing Umquikela made no difference to the Paramount Chief as far as his position towards his own people was concerned. He saw the advertisement in the paper that Sigcau had given these concessions, and reported the matter to the Government. It was contrary to native law and custom to give away any portion of his land to white men. They might set apart land, but they did not alienate it.

By the Court: Government bought land from the natives at St. John's River; but the disposal of land to another Government would be quite another thing to disposing of it privately.

Cross-examination continued: In his opinion, the sale of the land at St. John's River by Nquilisio was not a constitutional act. Sigcau did not know what such a period as ninety-nine years signified.

Re-examined: Cook once told him that, having paid valuable consideration for the concessions, any Government would have to support them.

Newton Ogilvie Thompson deposed that he was Resident Magistrate at 'Tsomo. Had been engaged by Government to translate documents in connection with the case. He had had sixteen years' experience as an interpreter. Witness was selected as an interpreter to accompany Mr. Rhodes, and was an expert interpreter. His instructions were to translate the concessions into Kafir. It took him two days of hard work to translate the four documents—about twenty-six hours altogether. He had great difficulty in finding terms equivalent to the technical terms. There was no Kafir equivalent signifying "sole and exclusive right," for instance. It could be conveyed to a Kafir, but there was no literal translation. The terms in the concession could only be conveyed to the Kafir mind in a roundabout way and by illustration. There was no equivalent for "square miles." It might have been explained to Sigcau that it would take him two days to ride round 160 square miles. It would not be possible for any interpreter to explain all the concessions at one meeting. The interpreter would gloss over all the difficulties of the terms. The substance of what was intended could, however, be explained.

Cross-examined by Mr. Solomon: He would not interpret such documents literally to an ordinary native, but would be able to convey the idea. Mr. Garner seemed to understand Kafir very well, and he believed he did speak Kafir very well.

William Thompson Brownlee, Resident Magistrate at Idutywa, deposed that he had for a greater part of his life lived amongst natives, and was an expert interpreter. He had translated the concessions in conjunction with Mr. Thompson, and agreed with the evidence Mr. Thompson had just given. Natives were very fond of asking questions, and such documents as these they would require to discuss many times over before thoroughly understanding them. These documents were most difficult to translate. The conclusion he drew on hearing Mr. Garner give his evidence was that he

would not have been able to translate the documents to Sigcau, while Houston knew nothing about translating them.

By the Court : He had never heard of coal being found in Pondoland.

Rev. Peter Hargreaves, a missionary connected with the Wesleyan Methodist Church, deposed that he had resided in Eastern Pondoland for thirteen years. He was not an expert in the Kafir language, but could understand it. Sigcau discussed with him in 1889 the question of the mineral concession he had given to Cook. Witness told the Chief he thought he had done wrong, and reminded him that there were already concessions of minerals to White and the Germans, and told him he ought to give Cook the money back. Sigcau said he would do that, and he gave him then £500, and said he would collect more money and return it to the Cooks. The money was in his possession for some time. It was given to witness to keep, so that he might return it to Sigcau to give back to Cook. Witness was not to give it back to Cook. Eventually Sigcau applied to him for the money, and witness gave it to him.

Cross-examined : As a matter of fact no money was paid back to Cook. That was the only discussion he had had with Sigcau about the concessions.

By the Court : He never told Cook that Sigcau intended to give him back the £500. He was aware that subsequent to that Cook paid more money to Sigcau.

Ntolana, examined by Mr. Juta, said he was Chief of the Balas, and lived about one day from the Great Place. He was a chief in the time of Faku, and lived higher up than he did then. He had a large following—some thousands. In Faku's time he was always called to meetings at the Great Place ; also in Umqu-kela's and Sigcau's time. He knew that Cooks were in Pondoland and wanted a railroad and permission to dig. Witness was never asked by Sigcau to attend the meeting on this matter ; but on all other important occasions he was called. Sigcau ought to have called him, as well as all the chiefs, on the subject. He heard that Sigcau had given the mineral and the railway concessions to Cook. He did not hear about the right to take timber, or the giving away of large extents of ground to the Cooks. If the Cooks had come to his territory to chop timber, or to make a railway, or build a house, he would not have allowed it. He never heard about the concessions of Sigcau to Girling or to the Germans. He did not know if, according to native law, Sigcau had any right to give away land ; but he would not have allowed anybody to take his land.

[Counsel here read over the names of those who had signed the concessions, witness explaining the standing of each, from which it appeared that some had land and following, but not the majority.]

Examination continued : All the Pondo chiefs should have been present to assent to the concessions or discuss all matters of importance. With regard to the railway, he never heard that land had been given away.

Cross-examined : Witness belonged to the Bala tribe, and Fadane was a big man among the Balas ; he was witness's uncle, and would represent the Bala tribe at the Great Place, though he heard his name was on the concessions. He (witness) had control over his people, but had left them. He was told by Sigcau about the railway and mineral concessions, but did not know that meetings were being held at the Great Place. Neither witness nor his tribe received any money from Sigcau in respect of the concessions. Witness looked upon Sigcau as his chief ; but he would not consent to his land being cut up even if he received compensation.

Re-examined : He was still the chief of his tribe, and led them to battle the last time. He did not know if Fadane would have the right to represent his (witness's) tribe at the Great Place. He never gave Fadane such permission.

Nqouyolo deposed that at present he was regent over the people and land of Qipu, who was now dead. They occupied a large extent of country. He did not know the Cooks, and knew nothing about the concessions. Sigcau never sent to Qipu about them, as far as witness knew. He never heard of any money being given to Sigcau by Qipu. Qipu used to be summoned to meetings at the Great Place ; but Sigcau never summoned him to talk about concessions. If anybody authorised by Sigcau came to dig on the land of his (witness's) people, he would not allow it. It was the custom to call all the chiefs together on important occasions.

Cross-examined by Mr. Solomon : Qipu had been dead about four years. Did not know anything about Sigcau having given Qipu part of the money of the Cooks. Would not agree to anybody turning him out of his land unless he knew of it.

The interpreter, in reply to the Court, said that "unless he knew of it" would mean unless he had been consulted.

Ntola deposed that he was chief among the Pondos, chief of the Amatangasi. He never heard about any concession being granted by Sigcau to the Cooks ; was never called to the Great Place to discuss it. [Counsel here read

the names affixed to the different concessions, the witness meanwhile giving the status of each.]

Cross-examined by Mr. Solomon: Sigcau did not send a messenger to him. He might have sent to others but not to him. Witness occupied land with Sigcau's permission, but if Sigcau wished to remove him he would do so, witness "would want to know why."

By Mr. Juta: He would not allow Sigcau to send a white man to come and turn him out. He did not know what he would do if Sigcau sent a white man to turn him out.

By the Court: If Sigcau wished to turn him out he would go to his chief and say "Do you wish to kill me?"

Nqungwini deposed that he was a Pondo and interpreter at the Great Place, and had lived in Pondoland all his life. He was at the Great Place prior to the concessions, and never heard of any meetings being held in connection with the concessions. He saw Cook at the Great Place. He was at the Great Place some time. He did not remember how long. He did not remember a public meeting. He sometimes accompanied Umhlangaso on matters of importance. Witness heard no discussions about concessions. He heard nothing except on the day he put his name to the document. Sigcau called all the chiefs together if anything happened. Manandu was a chief of importance, and was a bigger man by birth than Umhlangaso. He had heard nothing of the other concessions. He had looked at the names at the end of the concessions. Amongst the names were those of men he knew; others he did not know. There were many chiefs in Pondoland at that time whose names do not appear.

Cross-examined by Mr. Solomon: There were many people present who did not sign; there was always a large number of people about. Mr. Cook never employed witness to write letters to Sigcau about the concessions.

Re-examined by Mr. Juta: Witness did not sign the document the day he arrived there. He stayed at the Great Place all the time.

This concluded the evidence for the defendants.

Mr. Solomon asked that the further hearing of the case should be postponed until the first day of next term.

Mr. Schreiner thought the case should be postponed only until Monday, so that it might be finally decided whilst the evidence was fresh in the minds of the Court.

The Chief Justice said the Court was prepared to sit on Monday.

Mr. Charles Cook, recalled, stated in answer to the Court that he obtained the mineral con-

cession in 1889. They had since then only worked in three places, as they could not capitalise the concession until they got the railway concession. They knew there was coal and other minerals in the country, and they ceased to work the minerals until they got their railway. They got the railway concession in 1890, and then the difficulties of capitalisation came in, because they wanted land to work the railway. This land was conceded by Sigcau in 1893, and then they had to wait until the capitalists decided. They were dependent on the capitalists. There were capitalists prepared to finance the concessions quite irrespective of annexation. He had confidence in Sigcau, who had never, during the seven years he had known him, broken his word. Had confidence in Sigcau, and the capitalists in England were satisfied, and if annexation had never taken place would have had no difficulty in floating his concessions. Had correspondence to show that.

Mr. Stanford was also re-examined by the Court as to native laws and customs. In regard to Sigcau's power, supposing the country not to have been annexed, Cook would have had no redress against Sigcau if Sigcau had ultimately repudiated the concessions. It depended on Sigcau's good faith. Regarding the money Sigcau would receive from Cook, it would not be devoted to any public purpose. It would be the Chief's own money to dispose of as he thought fit.

By Mr. Solomon: Was aware that Sigcau was liberal to his subordinate chiefs, both in distributing his cattle and his money amongst them. Did not know if he so distributed this particular money.

The Chief Justice, addressing Mr. Solomon, said that until they had heard the Attorney-General, the Court would assume: (1) That Sigcau knew the nature of the concessions at the time he gave them; (2) that he was Paramount Chief of Eastern Pondoland. The two of the points which were uppermost in the mind of the Court, and on which they would like to hear Mr. Solomon, were whether the acts of Sigcau, he being a despot, could not be likewise despotically repudiated by him and how far the Government was bound to respect rights which could not have been enforced against Sigcau if no annexation had taken place; and whether rights which could not be enforced before could be enforced after annexation.

Mr. Solomon, in addressing the Court, contended that according to international law a Power taking over a country was bound to respect all the engagements of the country taken over. He contended that it was proved beyond the possibility of doubt that in Eastern

Pondoland prior to the annexation Sigcau was absolutely Paramount, and that he was recognised as such by all the other chiefs. It was urged on the other hand that Sigcau, being a despot, had the power to cancel the rights under these concessions if he felt so disposed. That, no doubt, was to a certain extent true, for there was no one to check Sigcau in the exercise of his arbitrary power, but he referred to the evidence of Mr. Chalmers as showing that according to Pondo law and custom he had no right to interfere with the concessionaires. Moreover, he relied upon the fact—which was of the greatest importance in the present case—that Sigcau had never repudiated the contracts and did not do so now. He had entered into an engagement with the plaintiffs, had received their moneys, and had no desire whatever to revoke the rights which he had ceded to them. The question of international law involved, viz., whether the Cape Colony was bound by the obligations incurred by Sigcau when he was the Paramount Chief of Pondoland, was one he thought, which admitted of no doubt, and on this point he referred to “Halleck’s International Law” (p. 336); *Republic of Peru v. Dreyfus* (38 Chancery Div., p. 348); *Strachan v. Colonial Government* (4 Sheil, 414). He contended that inasmuch as Sigcau had not repudiated the contracts at the time the country was taken over they were binding on the Colonial Government, and the plaintiffs were entitled to ask for the declaration claimed.

The Chief Justice referred to *Cameron v. Het Gouvernement* (1 Greg, 35).

The Attorney-General, in the course of his argument, said that the Government was bound, in the general public interest, to strenuously oppose alleged rights which involved the giving over of the mineral rights, railways, and trade of the country to white adventurers (he did not use the term in any offensive sense) who obtained them from native chiefs under such circumstances. One of the concessions gave the plaintiffs the right to trade in Pondoland free of duty, which would give them the monopoly of trade and be in direct conflict with the Customs law. He contended that the act of the Crown in deposing Umquikela in 1878 must hold good quite irrespective of any policy, good or bad, which followed such proclamation, and that therefore Sigcau, Umquikela’s successor, could not have the power of granting such concessions without the ratification of the Government. The case of Tembuland showed that, while the chief was allowed practically to remain paramount as far as internal native affairs were concerned after the annexation, the Govern-

ment still was the supreme power there. He contended that supposing no cession had taken place, Sigcau, even if he had so desired, could never have enforced the conditions involved by the concessions on subsidiary chiefs, and that the plaintiffs would have only been able to rely on the precarious will of Sigcau. Regarding Mr. Solomon’s argument on international law, he contended that those laws referred only to the relations between civilised countries, and could never hold good where one of the countries was barbaric.

Mr. Solomon replied.

The Chief Justice said: The voluminous evidence given in this case relates mainly to the two questions whether Sigcau understood the nature of the concessions which he granted to the plaintiffs and whether he was at that time the Paramount Chief of the Pondos. Upon neither of these questions do I entertain any doubt. The Chief was not misled in any way, but understood the terms of the concessions as well as any uncivilised and uneducated potentate can comprehend documents dealing with such complex questions as servitudes upon land. I am satisfied also, after carefully reading the Blue-books put in as evidence, that he was the recognised Paramount Chief of the Pondos. He was so recognised not only by the greater number of his tribe, but by the British Government itself. It is too late for the Colonial Government to rely upon the deposition of Umquikela by the Proclamation of 1878, seeing that, after that date, the Government in various ways continued to treat him as the Paramount Chief, and, after his death, officially addressed his son and successor, Sigcau, by that title and never in any way questioned that title. The very document by virtue of which the British Crown acquired the sovereignty over Eastern Pondoland was founded upon Sigcau’s right as Chief to make the cession, a right which only the Paramount Chief could exercise. The difficult and important question in this case is whether the rights which the concessions purport to confer upon the plaintiffs are enforceable by action in this Court against the Government which has acquired the Paramount Chief’s rights of sovereignty. It is a principle of international law that, where sovereignty is acquired by cession, the new Sovereign assumes the duties and legal obligations of the former Sovereign with respect to private property within the ceded territory. In the words of Chief Justice Marshall “the new Government takes the place of that which has passed away.” The difficulty lies in the application of that principle, with all its legitimate consequences, to grants of land promised and servitudes on land imposed by a

barbarous potentate ruling over barbarous tribes to whom private property in land is unknown. Before he ceded his territory to the British Crown, Sigcau had executed the four documents in question by which he purported to convey to the plaintiffs the right to select large tracts of land for their own exclusive use as well as the right to all the minerals in the country, and to construct a railway through the country. The consideration for these extensive encroachments upon the tribal tenure of the land was made payable to the Paramount Chief individually. He might, as a matter of favour, distribute a portion among his petty chiefs, but there was no obligation on him to expend any portion for the benefit of the tribe as a whole. In the decision of important matters he was generally assisted by his petty chiefs. The evidence is very vague as to how far he was bound to act upon the advice tendered to him and as to the particular chiefs he was bound to summon to his assistance. In granting the concessions to the plaintiffs he was supported by some of the chiefs and headmen, but some important chiefs neither signed the documents nor consented to the alienation. There is evidence to show that a Paramount Chief is practically a despot in the sense that, without even consulting all his petty chiefs, he might confer privileges which are repugnant to the usages of his tribe, but this right is qualified by the condition that he has sufficient power to enforce such privileges. Such a qualified right would apply to every unconstitutional act of a Sovereign, whether civilised or uncivilised, and it is certainly not a right which international law would compel this Court to recognise. Moreover if Sigcau is to be recognised as having been a despot without any restraint on his absolute power, he must be so recognised for all purposes. If he could make the concessions for the personal profit of himself and some of his petty chiefs and contrary to the interests of the whole of his tribe he could equally revoke the concessions for the benefit of his tribe. He did not, it is true, revoke the concessions before he ceded his country, but he did not make the recognition of those concessions a condition of the cession. He admits that he would have ceded the country even if he had known that the concessions would have been ignored, although he added that he believed they would be recognised. Under these circumstances it is difficult to hold that the Colonial Government is bound to uphold the concessions however injurious they may be to the interests of the inhabitants of the country taken over. The difficulty becomes still greater

when it is borne in mind that the native customs, such as they are, do not recognise such concessions and that even if they did there never existed any legal tribunal which could enforce the rights purported to be granted by the concessions. Upon the question of custom the evidence of Mr. Strachan, one of the plaintiffs' most important witnesses, is very significant. Being asked whether, as an expert in native law, he had ever known an instance of a native chief, even with the assistance of his counsellors, giving any concessions of this large description, his answer was: "This is quite a new thing; it has never been known before." In answer to the further question whether it was utterly foreign to native ideas he answered: "Quite so, we have educated them up to it." The education, however, has been entirely confined to the chiefs, and has not lasted so long or been so widespread as to establish any fixed custom. Servitudes such as the concessions purport to create upon the land held by the people have only been sought after of recent years and some of them had been granted by Sigcau to previous applicants. When he found he could get better terms from the plaintiffs he did not scruple to put an end to a concession which he had previously granted to Girling. He stated in his evidence that he revoked the concession to Girling because the rent had not been paid, but the evidence tends to show that the rent was not yet due at the time of the repudiation. There was no Court of law to declare Girling's rights as against Sigcau, and if the Chief had revoked the plaintiffs' concessions there would equally have been no remedy for his breach of contract. Up to the date of the cession the concessions had not yet been carried into practical effect. It is true that the mineral "graphite" had been sought for under the mineral concession, but no railway had been commenced under the railway concession, nor had any land been actually granted by Sigcau, or taken possession of by the plaintiffs under the land concessions. The land laws of this colony, to which Eastern Pondoland has been annexed, contain no provision for the granting by Government of tracts of land or servitudes on land such as are promised by the concessions. How then can the plaintiffs' rights be declared as against the Government? If declared, how are they to be enforced without any legislative sanction for the forms of grants which will have to be ordered? The new Government took over the legal obligations of the old, but the concessions created no legal obligations because their execution depended solely upon the will of the Paramount Chief and there existed no possible

means of enforcing them. If the new Government can be sued in the Courts of this colony for the enforcement of the plaintiffs' alleged rights, is it to be held liable also in respect of the concessions granted to White Brothers to Girling and to Nagel? These persons are not before the Court and I only mention them to show the difficulties which surround the plaintiffs' case. Under all the circumstances I am of opinion that no legal rights were acquired by the plaintiffs against Sigcau as can now be enforced against the Government and that the plaintiffs must fail in this action. In this view of the case it becomes unnecessary to inquire whether the Crown Liabilities Act of 1888, which refers only to claims arising out of contracts entered into on behalf of the Crown, is applicable to the enforcement of contracts made by a foreign sovereign of a territory before its cession to the Crown. It is unnecessary also to inquire whether the concessions do not constitute a breach of the 13th article of the treaty made by Faku with the British Crown in the year 1844. But while holding that, in strict law, the plaintiffs cannot succeed in this action, I am bound to add that, in my opinion, they have strong claims to the favourable consideration of the Government and Parliament of the country. They have expended much time and money in acquiring the concessions and their conduct throughout appears to me to have been honest and honourable. They had the example before them of the Swazi concessions and the Matabeleland concessions which have been recognised by the Imperial Government, and they might fairly have believed that the concessions honestly acquired by them would not be entirely ignored by any civilised Government taking the place of Sigcau. It may be impossible for the Government to give effect to the concessions in their entirety, but that is no reason why Parliament should not give the plaintiffs some compensation for the repudiation of concessions which might have been very valuable to them if there had been no cession to the British Crown. It is to be regretted that the defence which has now been sustained was not raised by way of exception to the plaintiffs' declaration. Such a course would have saved considerable expense, and would have rendered much of the evidence given in the case wholly unnecessary. Seeing that no such exception was taken, that the plaintiffs' conduct has been perfectly straightforward, that the action was by no means an unreasonable one, and that it was for the public interest that the important legal questions raised should be judicially determined, I am of opinion that, in giving judgment for the defen-

dants, the Court should order each party to bear their own costs.

Their lordships concurred.

[Plaintiffs' Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendants' Attorneys, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

COLONIAL ORPHAN CHAMBER V. STEWART. { 1895.
Mar. 12th.

Mr. Tredgold applied for provisional judgment for the sum of £317 4s.

Provisional sentence granted.

MALMESBURY BOARD OF EXECUTORS V. BASSON

Mr. Sheil moved for provisional sentence (1) for the sum of £62 ls. 6d., balance of interest due to 15th June, 1894, upon a bond of £2,800 dated 6th August, 1892; (2) for the sum of £88 11s. 3d., interest from 15th June, 1894, to 31st December, 1894, due on a bond of £2,800 now reduced to £2,725; (3) for £4 15s. 6d., balance of premium of insurance to 15th June, 1895.

Provisional sentence was granted as prayed.

SMITH V. THERON.

Mr. Watermeyer moved for the final adjudication of the defendant's estate.

Order granted.

EBDEN V. BOTHA.

Mr. Graham moved for provisional sentence for the sum of £2,000 due on a bond, with interest from 1st July, 1894.

Order granted.

ALFORD, WILLS AND CO. V. BRINK.

Mr. Benjamin moved for provisional judgment for the sum of £38 17s. 3d.

Provisional sentence granted.

MASTER V. DISMORE'S EXECUTRIX.

Mr. Giddy applied for an order calling upon the executrix in the estate to file an account.

Order granted.

DE VILLIERS V. VAN DYK.

Mr. Tredgold applied for provisional sentence for the sum of £30.

Provisional sentence granted.

FINDLAY AND CO. V. KLAAS AND ANOTHER.

Mr. Buchanan applied for judgment for the sum of £42 15s. 4d.

Granted.

ROSS AND CO V. LOTZE.

Mr. Tredgold applied for judgment for the sum of £199 0s. 9d.

Granted.

SCOTT V. DODWELL.

Mr. McLachlan moved for judgment for the sum of £28 3s.

Granted.

Ex parte THURSTON WHITTLE.

Mr. Watermeyer moved for the rehabilitation of this insolvent.

Order granted.

GENERAL MOTIONS.**BRADFORD V. GREEN AND ANOTHER.**

Mr. Benjamin applied for an order for the removal of the suit between the parties from this Court, for trial, to the Circuit Court to be held at Aliwal North on or about the 11th April next.

Order was granted by consent.

DE BEERS MINES V. KIMBERLEY WATERWORKS.

This was an application by the respondents for leave to appeal to Her Majesty the Queen in her Privy Council from the two judgments of this Court delivered on the 1st inst. in the suit between the parties.

Mr. Searle, Q.C., and Mr. Joubert for the applicants.

The order was granted.

IN THE MATTER OF CATHARINA E. B. OTTO.

Mr. Graham moved for the appointment of a *curator ad litem* to represent the said Otto, alleged to be an imbecile, in the proceedings about to be instituted in the Oudshoorn Circuit Court, to have her declared of unsound mind and incapable of managing her affairs.

The Court granted the order as prayed, and appointed Mr. Tredgold *curator ad litem*.

HUDSON, VREEDE AND CO. V. COOPER.

Mr. Juta, Q.C., applied for an order for the removal of the suit between the parties for trial to the Circuit Court to be held at George on or about the 25th instant.

Mr. Innes, Q.C., asked that the case should be heard at Knysna.

The Court granted the order, the bar to the defendant's plea to be removed, costs to be costs in the cause.

PARKIN AND OTHERS V. LIPPERT AND OTHERS.

This was an application by the defendant Lippert for the issue of a commission to take evidence in London of one August Barsdorf, a material witness on behalf of the said defendants.

Mr. Searle, Q.C., for the applicants.

The Court granted the order, Mr. Mackarness being appointed the commissioner.

THE PETITION OF SUSANNA W. WILLEMS.

Mr. Tredgold moved for leave to sue by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion.

Order granted, returnable on the 1st August, in the terms of the prayer, personal service to be effected if possible.

IN THE INSOLVENT ESTATE OF GEORGE EDWARD MANDY.

Mr. Tredgold applied for an order to make absolute the rule nisi restraining Geo. S. T. Mandy from removing any property now on the farm Pelion, near Lady Grey, and from alienating or disposing of any stock or produce removed from the said farm since the sequestration of the said estate.

Mr. Tredgold also applied for an order varying the decision of the Resident Magistrate of Aliwal North as to the votes recorded at the third meeting of creditors of the said estate, whereby it is alleged that the interests of one Louis F. Heese and other creditors will be prejudiced, on the ground that such decision was illegal.

Mr. Searle, Q.C., for the respondent.

The Court made no order on either application. The interdict was discharged; costs to come out of the estate.

IN THE MATTER OF THE CAPE OF GOOD HOPE BANK.

Mr. Innes, Q.C., moved for an order authorising the official liquidators to destroy the books in their possession re-

lating to the business of the bank, to pay over unclaimed moneys to the Master of the Supreme Court, and to file the records of the liquidation with the Registrar.

The order was granted authorising the destruction of the books.

WHITTING V. WHITTING.

Mr. Watermeyer moved for the removal of the suit between the parties from this Court for trial to the Circuit Court to be held at Oudtshoorn on or about the 21st inst.

Order granted.

STABBER V. MEEZER'S EXECUTOR.

Mr. Innes, Q.C., moved for leave to the defendant to sign judgment against the plaintiff in the suit between the parties, by reason of his failure to proceed with his action to debate the liquidation and distribution account framed by the said executor within the period prescribed by the rules of Court, and for costs.

Mr. Tredgold for the respondent, the plaintiff in the action.

The facts are briefly these:

Moore in his capacity as executor dative of Andrew J. P. Neezer was sued to debate certain account framed by him as executor. Moore offered to debate it before one of certain persons named by him, and Syfret was agreed upon jointly for the purpose.

Moore proceeded thereafter to bar Slabber from declaring or making claim, two terms having elapsed without Slabber proceeding in the matter.

The Court made no order, but put the plaintiff to terms by ordering him to go to trial next term. The question of costs to be considered at the trial.

HILL BROTHERS V. REICH.

Mr. Sheil applied for the removal of the suit between the parties for trial to the Circuit Court for the district of Albert, to be held at Burghersdorp on or about the 3rd April next.

Order granted.

COMBRINCK AND CO. V. COLONIAL GOVERNMENT. { 1895.
March 12th.

Arbitration—Award—Rule of Court.

In consequence of a resolution of Parliament that it was desirable to acquire certain properties, including the applicants' premises, for railway purposes, the Government decided to expropriate the applicants' pre-

mises and agreed with them in the widest terms to submit to arbitration the compensation "for any loss or damage of whatsoever kind caused or to be caused to the applicants by reason of the said expropriation or consequent thereon," and to have the award of the arbitrators made a Rule of Court.

Held that, in the absence of partiality or misconduct, the Government cannot successfully resist an application to have such award made a Rule of Court on the ground that the sum is larger than was contemplated by the Government or Parliament at the time when the expropriation was decided upon, more especially as the applicants had, before such resolution, claimed more than the amount ultimately awarded.

This was an application to make the award of the arbitrators in this matter a Rule of Court in terms of the deed of submission.

The facts are these:

The Colonial Government desiring to make certain alterations and extensions at the Cape Town Railway Station proposed to acquire landed property situated in Strand-street belonging to the applicants and others, and a resolution to that effect was passed by both Houses of Parliament. On failure of mutual agreement as to the terms of the sale the matter was referred to arbitrators: Mr. Sauer being appointed by Combrinck & Co. and Captain Jackson by the Government. The arbitrators appointed Mr. Steytler as umpire.

The Deed of Submission contained the following clause: "Whereas the Colonial Government has decided to expropriate according to law and in terms of a resolution of Parliament a certain piece of land with house and shops being the property of Messrs. Combrinck & Co. and at which . . . (they) . . . are at present carrying on the business of butchers, &c., and whereas disputes and differences have arisen as to the amount of compensation to be paid in respect of the said land and premises, and for and in respect of any loss or damage of any kind whatever caused or to be caused to the said Combrinck & Co. by means of the said expropriation or consequent thereon."

The parties to the deed then submitted "in the most absolute and irrevocable manner the amount of recompense to the said Combrinck & Co. . . . as aforesaid to the final award, arbitration, and determination"

of the arbitrators named: the majority to decide in case of difference of opinion. The parties also agreed that the award should be made a Rule of Court pleadable in any suit in respect of the premises.

The arbitrators by a majority decision fixed the purchase amount at £55,000 (Combrinck & Co. having demanded £77,000), Government to pay costs of reference.

Combrinck & Co. applied for the award to be made an Order of Court; Government opposed the application on the ground that the sum fixed being in excess of the estimate approved by Parliament the scheme could not be proceeded with until the matter had been laid before Parliament again; and that a large portion of the purchase amount so fixed was due to the views of the arbitrators as to the loss to the firm in connection with their being deprived of a certain siding made by the Government and Combrinck & Co., into the premises in Strand-street.

Mr. Rose-Innes, Q.C., and Mr. Graham for applicants.

Mr. Juta, Q.C., and Mr. Giddy for the Government.

The application was granted.

The Chief Justice said: Counsel for the Government has candidly stated at the outset that he is not prepared to impeach the validity of the award itself, and the question to be determined is therefore very much simplified. It appears that as far back as the 24th of March, 1894, the General Manager of Railways wrote to the applicants saying that it had become necessary to acquire their property in Strand-street for railway purposes and inquiring as to the lowest sum which they were prepared to sell them for. On the 28th of March the applicants said in answer that they would not consider themselves compensated by any sum less than £77,000. With the knowledge that this was the sum claimed the Government submitted certain resolutions to Parliament, one of which was as follows: "That it is desirable to acquire for railway purposes such adjoining properties as are not now held by the Government." The resolution having been adopted, a deed of submission was signed by the applicants and the Government, which is as wide in its scope as such a submission can be. The deed says: "Whereas the Government has decided to expropriate according to law and in terms of a resolution of both Houses of Parliament the premises in question, and 'disputes and differences have arisen between the said parties as to the amount of compensation to be paid,' and 'whereas disputes and differences have arisen as to the amount of compensation

to be paid in respect of any loss or damage of any kind whatsoever caused or to be caused to Combrinck & Co. by reason of the said expropriation or consequent thereon—now therefore we the said parties do by these presents in the most absolute and irrevocable manner submit the amount of compensation to be paid to Combrinck & Co., and by them to be accepted as the final award of the arbitrators." The deed then proceeds to provide that the award of the arbitrators shall be made an order of the Supreme Court. The arbitrators have awarded the sum of £55,000, being £22,000 less than the sum which the Government all along knew was demanded by the applicants and the applicants now ask to have the award made a Rule of Court. It is difficult to understand from the affidavits what the real objection to the award really is. The amount is certainly very large, but there is no allegation of partiality or misconduct on the part of the arbitrators. If their award had been for a far lesser sum, the applicants would have been bound to abide by it, and they could not have refused transfer in the face of the deed of submission. The Government, through their counsel, say that the amount is so large that the sum voted by Parliament would be far exceeded if the remaining land required should be valued in proportion, but these are considerations which should have occurred to the Government before they became parties to the deed. They consented to compensation being awarded not only for the value of the land to be expropriated but for all consequential damages occasioned by the expropriation. Among such damages was the loss of a valuable site for the applicants' butchers' business and the removal of the business to a less conveniently situated site. These damages the arbitrators have taken into consideration, and in the absence of any allegation of partiality or misconduct, I am of opinion that the application to have the award made a Rule of Court must be granted with costs.

Mr. Justice Upington: I am clearly of the same opinion, and I am somewhat surprised that the Government should endeavour to retire now from the effect of the arbitration, simply because the amount awarded is large. Persons may have their own ideas as to what is a large amount and what is a small amount, but that does not in the slightest degree affect my mind. I say that the Government legally had no power to retire from the effect of the terms of the deed of submission.

[Applicants' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondents' Attorneys, Messrs. J. & H. Reid & Nephew.]

Greeff v. Pretorius.

{ 1895.
March 12th.

Lessor and lessee—Rent—Tacit hypothec—

Attachment—Reasonable ground for belief of tenant's intention to remove goods.

A lessor, who reasonably apprehends that the lessee will remove movables from the premises leased, is entitled to an order for the attachment of such movables pending an action to recover the rent due.

Such apprehension is not unreasonable where the rent is long overdue after several applications for payment, and the lessor has reason to know that the lessee had left premises previously hired by him from another person without payment of the rent due.

There was a motion on notice to the present respondent (original applicant) that application would be made for the discharge of the order obtained by the respondent on the 29th November, 1894, and why he should not also pay the costs of the motion.

The facts are these:

On the 30th June, 1898, the respondent and applicant executed a written lease for twelve months in terms of which Pretorius let to Greeff a certain water erf with the buildings thereon in Brit's Town at £2 per month payable six-monthly. At the expiration of the lease Pretorius reduced the rent to £22 per annum.

On the 29th November, 1894 (seventeen months' rent being then due), Pretorius made an *ex parte* application to the Court for an order attaching Greeff's printing plant and other printing apparatus, then on the premises let, pending the result of an action to recover the rent due. The Court granted the order of attachment, but gave leave to Greeff to apply to have the order set aside on showing sufficient cause.

On the 1st December the goods were attached, and on the 28th December the amount due for rent was paid by Greeff, who however declined to pay the costs occasioned by the attachment, and he now moved to have the order of the 29th November last set aside with costs. The main grounds relied upon by Greeff were (1) that only twelve months' rent was due and that Pretorius had agreed to give him three or four months' time within which to pay the £24; (2) that the last five months' rent claimed was not yet due, as the rent was only payable six-monthly as under the lease for the first twelve months; and

(3) that the attachment was wholly unnecessary and under the circumstances illegal. Greeff emphatically denied that Pretorius had reason to believe that he would remove his printing plant and printing apparatus from the premises in order to evade the payment of rent or any debt due by him to Pretorius, and he submitted that he should not be called upon to pay the costs of the attachment.

In answer to the above, Pretorius denied that he had agreed to give Greeff an extension of time within which to pay the first twelve months' rent. He alleged that he had made frequent demands for his rent but without success, that he knew that Greeff was indebted to one Jaarsveld in the sum of £12 or thereabouts, also for arrear rent on premises previously occupied by Greeff, and that he conscientiously believed that if he had proceeded against Greeff without applying for the attachment, the printing plant and other printing apparatus would have been removed from the premises, and that in consequence he would have been a loser. Clause V. of the lease was in the following terms.

V. *The Lessee and Lessor shall have to give one the other one month's notice in writing for terminating this contract after the expiration of the same.*

Mr. Searle, Q.C., for the present applicant; The application for the attachment of Greeff's printing plant was most unjustifiable, and no grounds were alleged for it in the original petition. See *Brett v. Erasmus* (3 Roa. 50); *Spiegel v. Eisenbach & Co.* (1 Juta, 226).

If a landlord applies for an order of this kind the onus is on him of satisfying the Court that there are reasonable grounds for the application. *Vost* (2, 4, 18, 19.) The order cannot be given as a mere matter of course. The principle underlying the 8th Rule of Court would apply to attachments of this kind.

If Pretorius gave Greeff an extension of four or five months to pay the first twelve months' rent, as he and his witnesses say, then clearly there was no justification for the attachment as the last five months' rent was not due, the rent being payable every six months.

Even if the property had been removed from the premises the Court could order it to be returned. *Board of Executors v. Stigling* (Buch., 1868, p. 25). Under the circumstances Greeff should not be ordered to pay the costs of the attachment.

Mr. Sheil for the respondent: It is clear from clause V. of the lease that at its expiration there was no tacit relocation—*Vost* (19, 2, 10)—consequently seventeen months' rent was due when the order was applied for. Several appli-

otions had been made for the rent but in vain. Our law is far less favourable to a landlord than the English law and an order attaching the tenant's goods is his only security, because if the goods are removed without a previous order of Court the landlord is without remedy. *Warren v. Clements* (1 Sheil, 287) *Re Price* (3 Juta, 139). In *Beard of Executors v. Stigling*, the goods were ordered to be returned to the premises because they were already *in custodia legis* when they were removed.

There is no similarity between the arrest of a person under the 8th Rule of Court and an attachment of goods as in the present.

It is submitted that Pretorius had ample justification for applying for the order of attachment.

The application was refused with costs.

The Chief Justice said: The lessor has a tacit hypothec for his rent upon the tenant's movables so long as they are upon the premises leased. Upon the removal of the movables the hypothec ceases unless there had been a previous order of attachment, in which case the Court would order the lessee to return the goods to the premises for the purpose of giving effect to the attachment. Such being the law the Court has always aided the vigilant creditor, and has never required the very strictest proof that the tenant intended to remove the goods. It is sufficient if the lessor has reasonable grounds for apprehending that the tenant will remove the goods. In the present case it is impossible to say that there were no reasonable grounds for the respondent's belief. His grounds are that seventeen months' rent is due, that several applications for payment have been made without success, and that the applicant had left premises previously hired by him from another person leaving the rent unpaid. Instead of issuing a summons for the rent the respondent obtained the order of attachment, and as there was reasonable ground for the original application, the present application to set aside the order must be refused with costs.

Mr. Justice Upington concurred.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinne; Respondent's Attorney, Paul de Villiers.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS (Chief Justice),
Mr. Justice BUCHANAN, and Mr. Justice
UPINGTON, K.C.M.G.]

LAWRENCE V. LAWRENCE. { 1895.
March 18th.

This was an action for restitution of conjugal rights, failing which for divorce, instituted by Mr. Harold Roberts Lawrence against his wife, Mrs. Emmeline Lawrence (born Roden).

The defendant was sued by edict, and the intendit alleged that the parties were married at Usk, in the county of Monmouth, England, on 8th December, 1875.

That there was no issue of the marriage.

That on the 7th December, 1875, before the solemnisation of the marriage and in consideration of the marriage, certain deeds or indentures were duly entered into by the plaintiff, the defendant, and others for the purpose of marriage settlements.

That thereafter in or about the year 1878 the defendant wrongfully, unlawfully, and maliciously deserted the plaintiff, and neglected and refused, and still neglects and refuses to return to the plaintiff or to restore to him his conjugal rights.

The plaintiff claimed:

(a) An order for the restitution of his conjugal rights, or failing compliance with such order:

(b) A divorce.

(c) A forfeiture by the defendant of all benefits accruing to her from the plaintiff by the deeds of settlement above-mentioned.

(d) Alternative relief and costs.

For a special plea and before pleading to the merits of the intendit, the defendant says as follows:

She denies that the plaintiff is domiciled in this colony. She herself is domiciled in England, and has never been within this colony.

Wherefore she submits that this Honourable Court has no jurisdiction in the present suit, and prays that the plaintiff's application may be dismissed with costs.

For a plea the defendant admitted the formal allegations in the intendit, and alleged that at divers times between the date of her marriage and the year 1878, the plaintiff ill-treated and behaved with great cruelty to her, and was of intemperate habits, and it became dangerous and unsupportable for the defendant and injurious to her health to continue to reside with him.

That she therefore, in the year 1878, left the plaintiff and has since resided apart from him.

That since the year 1878 the plaintiff has not contributed to her support, nor has he, until the commencement of these proceedings, asked her to return and live with him as man and wife.

She alleged that it would be dangerous for her, owing to her state of health, to undertake a sea voyage from England to the Colony, and she therefore prayed that the plaintiff's claim might be dismissed with costs.

Issue was joined on the replication.

Mr. Watermeyer appeared for the plaintiff.

Mr. Rose-Innes, Q.C., and Mr. Benjamin for the defendant.

Harold Roberts Lawrence, the plaintiff, deposed that he was a mining engineer, at present residing in Cape Town. He was employed by the firm of Coghlan & Cherry. Had been with them since the 6th December last. Was married to the respondent on the 8th December, 1875. Was residing at Mostyn, between Rhyl and Chester. Was at the time under notice to leave his employers, the Mostyn Coal and Iron Company, in consequence of the works being curtailed. His marriage was not postponed, but Colonel Roden, his intended wife's father, knew that he was on the point of leaving Rhyl. After the marriage they then went to live at Llangibby Castle, the residence of his father, and took over the sub-management of his father's property, which was extremely large. Afterwards, in 1877, his father bought for him a metal-broking business in Chester. He continued in that business nine years. They moved to Uplands in July or August of 1877. His wife raised no objection to going to Uplands. His wife did not bring any money on her marriage or afterwards, but there were settlements on both sides. His father gave him the house at Uplands for them to reside in. Witness paid all the household expenses. Colonel Roden never in his life gave him any money. He kept three horses, and there were two servants. Did not think he was ever drunk in the presence of his wife. Never in his life struck her. Knew Major Carnegie. A Volunteer dinner was given in February, 1878. Witness was twenty-five years of age at that time, and was a subaltern in a Volunteer regiment commanded by Colonel Roden. Witness went to the dinner late, but was not present at the officers' meeting prior to the dinner. He admitted that he, like a good many others at that dinner, "got fresh." It was quite untrue that he resigned from the regiment because of his conduct at that dinner. Sent his papers in

in August, 1878, because his wife had left him and he had quarrelled with Colonel Roden. Did not at that dinner draw his sword and attempt to stab an officer named White. Was most friendly with White; always on excellent terms with him. He was not given to gambling and horse-racing after his marriage, but before his marriage he rode to hounds and in steeplechases. Was well known as a steeplechase rider. Had ridden five winners in two days. His wife was always delicate. At certain periods she was very poorly. At the time his wife left the house he had not lived with her as his wife for about two months. On the occasion when his wife struck him with a stick he had been riding out to Abergavenny, and owing to the frozen state of the ground he did not arrive back at the house until about 10.30. He had not been drinking, and his wife came down to the dining-room with a stick and struck him across the head. He put his wife out into the hall, and afterwards he found his wife lying in a faint in the drawing-room. The following morning she asked his forgiveness, said she had been suffering from neuralgia, and that she was not responsible for her actions. He fetched the doctor for her that morning, and he (witness) went to Newport and arranged that his wife should go to Newport to have a tooth drawn. Through all these incidents just subsequent to the scene he had mentioned he and his wife were on good terms, and after the tooth-drawing his wife left according to arrangement for her father's house. Had no idea that she intended to leave him for good. She was at Llangibby Castle for a little time after that and he visited her there. They had no quarrels at that stage but were on good terms. Then his wife left Llangibby Castle and he had never spoken to her since. Afterwards broke up his establishment at Uplands and finally left there on the 10th November, 1887. Belonged to the Newport and County, the Monmouthshire and Leicestershire County Clubs. After he left Colonel Roden's regiment in 1878 he served in the Gloucestershire Hussars. He left England for South Africa in 1887, and went to the Transvaal, and after living there up to 1893, when his father died, he returned to England. He then attempted to effect a reconciliation. Colonel Roden was assassinated in Corsica in 1887, and he wrote to his wife offering to go to Corsica for her. She refused. All his correspondence he lost in 1888. Had worked for various people in England and South Africa, and had received testimonials as to good character.

Cross-examined: Resided with his wife from 1878 to 1887, Came to South Africa then with

the idea of getting employment as a mining engineer. Filled various posts in the Transvaal. He went to England in 1893, and since his return had not been able to acquire property pending the action. He would not admit that it was on account of the money difficulty that he was bringing the action. He wanted to get his money free under the marriage settlements. His wife had been fairly kind to him, and offered once to lend him £3,500. He had ceded half of his rights to his brother. His memory was not at fault when he said that he was not of drunken habits when he lived with his wife, or that he ever ill-used her. The evidence of Major Carnegie, taken on commission, that he behaved disgracefully at the Volunteer dinner was not correct.

In reply to the Chief Justice, witness said that the evidence taken on commission in Wales had been raked up by a little solicitor named Watkins. It was perfectly untrue that his behaviour to his wife was anything like what was stated in that evidence.

Cross-examination continued: His wife had given untrue evidence on oath as to his alleged ill-treatment, and so had the servants who had given similar evidence.

Re-examined: An incident occurred in 1887 in which he was charged with drunkenness, and Lord Fitzhardinge had been "on the carpet" over it, and would not let him go to the Court. Had he answered to the charge there would have been no conviction.

Voluminous evidence, taken on commission on behalf of the respondent in England, was read, the burden of it being that the respondent would not go back to her husband in consequence of his bad conduct, ill-treatment, and intemperance.

After argument,

The Court granted absolution from the instance with costs.

The Chief Justice said: This is an action by the husband to compel the wife to return to him and to cohabit with him. An action of this kind cannot be successfully brought unless the plaintiff proves that the desertion was not only wilful but also malicious, and it lies upon the plaintiff, therefore, to prove that his wife has maliciously deserted him. Now, in my opinion there can be no malice if the husband has given cause for desertion. We have a case here of a delicate, nervous wife, towards whom the plaintiff on several occasions has shown considerable unkindness, to say the least of it. According to her evidence he was frequently intoxicated, and while in that condition went so far as to assault her. In this evidence she is corroborated by the groom, who witnessed one of

the scenes, and a maid-servant who was also present. Well, the plaintiff positively denies all these statements, but I cannot bring myself to think that this lady has concocted a falsehood like this, and that she has been in conspiracy with the groom and maid-servant in order to bring this false charge against the plaintiff; especially when I take into consideration the fact that one of the witnesses—who was admitted to be an impartial and respectable witness—I mean Major Carnegie, swears positively that on two occasions he was a witness to acts of drunkenness during the time that the plaintiff was still living with his wife. If the plaintiff had candidly admitted what was stated by Major Carnegie to be only partly true one might attach more weight to his evidence given with regard to the other acts alleged, but he positively denies everything that Major Carnegie says. After giving the matter my best consideration I can only come to the conclusion that there is proof of ill-treatment in the year 1878 which justified the respondent then in refusing to live with her husband. My only difficulty has been, whether the acts of unkindness in the year 1878 are sufficient justification to the defendant to refuse now, in the year 1895, to return and live with her husband. Now, if the plaintiff had candidly admitted that the acts of unkindness did take place in 1878, and stated that since that time he has become a reformed character and it was his intention to deal kindly with his wife in the future, something might have been said for him, but that is not the position he takes at all; he denies positively everything put forward in the evidence for the respondent as regards his conduct. Then again it appears now that the evidence was tendered to the commissioner of acts of drunkenness on the plaintiff's part after the parties had ceased to live together up to as late as the year 1893; and that that evidence was objected to by the counsel for the plaintiff, and being so objected to was rejected by the commissioner. So it does not lie now in the plaintiff to say that he can prove he is a reformed character, because he refused to allow evidence to be given by the respondent as to his character since 1878. Under these circumstances I am afraid there is no course open to the Court but to grant absolution from the instance with costs.

Mr. Justice Upington: I am also of the same opinion. I do not think that the plaintiff is what has been described as a confirmed drunkard; he does not present that appearance to me at all. But I think he is one of those flighty men who when he has taken a little liquor is rather free in the use of his hands;

and if he were in a position to show me now that he had given up that bad habit and had quieted and sobered down and was a different sort of man from what he had been proved to be in 1878, I think there would have been great weight in Mr. Watermeyer's argument.

[Plaintiff's Attorney, D. Tennant, jun.; Defendant's Attorneys, Messrs. Van Zyl & Buis-sinné.]

HOPE V. ILLARIO. { 1895.
March 13th.

Slander—Publication—Admission.

The Court, on appeal, refused to reverse a Magistrate's judgment awarding damages in an action for slander, where although no evidence of publication had been given, still there was a clear admission in a letter of apology signed by the defendant that she had used the words complained of.

This was an appeal from the decision of the Acting Resident Magistrate of Cape Town in an action in which the present respondent, plaintiff in the Court below, sued the appellant, defendant, for £10 damages for slander.

The summons alleged that the defendant did on or about the 25th day of December, 1894, and at Cape Town, falsely and maliciously speak and publish of and concerning the plaintiff, in the presence and hearing of Catherine Kune, Mrs. Kirton, and divers other persons, the false, scandalous, and defamatory words following, that is to say, "you are a w——."

The defendant in her plea denied the debt, pleaded the general issue, and claimed in re-convention £20 damages for slander.

The evidence went to show that after the letter of demand had been sent the defendant called at the office of the plaintiff's agent, and signed an apology, for the publication of which she undertook to pay, it being agreed that no further steps would be taken if the defendant paid the cost of advertising the apology. This she neglected to do, and a summons was issued. When the above evidence had been given, the plaintiff's case was closed, no evidence having been produced as to the publication of the slander.

The defendant's agent then applied for a dismissal of the plaintiff's claim on the grounds that as she had accepted an apology she could not recover damages.

The Court refused the application. The defendant then gave evidence. She practically admitted that she used the words complained of, but not until the plaintiff had used similar language towards her. The defendant further

alleged that rather than go to court she gave an apology, and undertook to have it advertised in a paper which charged 12s. for the advertisement. The plaintiff, however, insisted upon having the apology inserted in a newspaper which charged 15s. for the advertisement, and in consequence it was not published in either of the papers.

At the conclusion of the defendant's evidence the counter claim was withdrawn.

Judgment was given for the plaintiff for £1 with costs.

The defendant now appealed.

Mr. Graham was heard in support of the appeal and contended that the Magistrate should have dismissed the case as no proof of publication was given.

The respondent was not represented.

The Court dismissed the appeal.

The Chief Justice said: The evidence in this case is very meagre, but it is not so important a matter that it would be fair on either party to put them to the expense of bringing fresh evidence before the Magistrate's Court. The evidence before the Magistrate was that there had been an apology in which the defendant admitted in distinct terms that on Christmas Day she uttered slanderous words concerning the plaintiff. Now the only words that could have been referred to appeared in the summons, and in the summons it is stated that the words were uttered in the hearing and presence of other persons. Mr. Graham says that the summons was issued after the apology, but at any rate the apology was sent after the letter of demand, and we may fairly presume that that letter of demand was in terms of the summons, and the letter of demand having been sent, the defendant sends an apology, in which there is a clear admission of having uttered the slanderous words complained of. It would have been much better if the Magistrate had taken some additional evidence, but still I think the defendant might well have left the matter as it was decided by the Magistrate. The appeal must be dismissed.

[Appellant's Attorney, Paul de Villiers.]

MCCAHY V. WILLIAMS. { 1895.
March 13th.

Writ of arrest—8th Rule of Court.

Writ of arrest refused where no application had been made to the Registrar under the 8th Rule of Court.

This was an application for a writ of arrest against the defendant, who was alleged to be indebted to the plaintiff in the sum of £16,

and who was also alleged to be leaving for England this afternoon by the mail steamer without having paid the claim.

A summons was issued out of the Magistrate's Court of Cape Town this afternoon, but there was no evidence that it had been served upon the defendant.

Mr. McLachlan was heard in support of the application, and relied on the eighth rule of Court.

The Court refused the application.

The Chief Justice said: It may be very hard on creditors that debtors should leave the country without paying their debts, but of course if they give credit to people they must bear the consequences. Under certain circumstances debtors may be arrested, and where there is an Act of Parliament or a rule of Court authorising the arrest the Court will grant an order to give effect to it; but in the absence of any authority the Court will not grant an order arresting any person, because the liberty of the subject is more sacred even than the right of a creditor to recover his debt. In the present case, if the plaintiff has any claim at all the proper course is to obtain his writ from the Registrar in the ordinary way. If he has already issued his summons in the Magistrate's Court it is unfortunate, but he may be able to withdraw that and then get his writ from the Registrar of this Court. The application should not have been made in its present form, and will therefore be dismissed.

[Petitioner's Attorney, C. J. MacColla.]

REGINA V. JOHN STEVEN ADAMS.

Mr. Giddy applied for the removal of this case to the circuit at Worcester.

The order was granted.

HEARNS V. JACKSON. } 1895.
March 13th.

Magistrate's jurisdiction—Act 20 of 1856, section 10 — Ejectment — Agricultural Lands Act, 1882—Sub-Lease.

J., the wife of a licensee under Act 37 of 1882, acting under a power of attorney from her husband, sub-let the land leased to H., but before the expiration of the sub-lease she entered upon the property and resumed possession.

H. sued J. in the Magistrate's Court for ejectment, and judgment was given in favour of J.

Held on appeal, without deciding as to the validity of the sub-lease entered into between

J. and H., that the Magistrate would have been justified, owing to want of jurisdiction, in granting absolution from the instance on the claim for ejectment.

This was an appeal from a decision of the Resident Magistrate of Queen's Town in an action in which the present appellant, plaintiff in the Court below, sued the respondent, defendant, for ejectment from the farm Middlefield.

The summons alleged that the defendant (Isabella Kismal Jackson), acting under a power of attorney from her husband, Alexander Forbes Jackson, did on the 29th day of April, 1893, by deed demise and lease unto the plaintiff the farm Middlefield (with the buildings and erections thereon, save one room in the said deed referred to) for the term of three years from 15th day of May, 1893, and at a rental of £40 per annum. (Copy of the deed was annexed.) That in the month of January, 1894, and on or about the first day of September last, the defendant by herself and with certain members of her family wrongfully and unlawfully entered upon the said farm Middlefield and into the homestead thereof and although requested she has refused since the 1st September last to quit the said farm and homestead, that she illegally interferes in the operations of the said farm, causes annoyances and disturbances, has burned the grass and a hedge of the said leased land, and has abused and assaulted the plaintiff's workmen and caretakers, and other illegal acts she has committed.

Wherefore the plaintiff prays the judgment of the Court against the defendant with costs, and also prays that she be ordered forthwith to quit the said farm Middlefield, and failing which that she be summarily ejected.

The defendant filed the following pleas and claim in reconvention:

1. On the 29th April, 1893, the date of the alleged lease to plaintiff, the said farm Middlefield was held by Alexander Forbes Jackson, since deceased, under licence from the Commissioner of Crown Lands, in terms of the Agricultural Lands Act of 1882, dated 9th December, 1890, upon condition, *inter alia*, that the licensee should personally reside on the land, and that the interest of the licensee in the land should not be assignable except under the provisions of the said Act. The said Alexander Forbes Jackson did not lease or assign his interest to the plaintiff under any provision of the said Act, and the defendant had no lawful power or authority to lease or assign the said land or the interest of the licensee therein,

2. The defendant did enter into an agreement for a lease with the plaintiff on the terms set forth in the document annexed to plaintiff's summons, which contained an undertaking among other provisions that plaintiff would keep the farmhouse, buildings, walls, fences, hedges, dams and water furrow in good order and condition, that he would maintain the garden and carefully preserve all ornamental and fruit trees, bushes and shrubs, and not cut or permit to be cut or destroyed any such trees, or the mimosa trees or bushes on the farm and especially those near the houses, and would not without consent assign, underlet or part with the possession of the said farm or any part thereof, such agreement being made at a time when the licensee had permission to be temporarily absent from said land and when defendant was unable through illness to manage the same or transact business. But the plaintiff disregarded and broke all the said conditions and caused or permitted great damage to the farmhouse, buildings, garden and trees, neglected the water furrow, removed a large portion of the fences and sublet or parted with the possession of the farm or part thereof, thereby endangering the licensee.

3. The said Alexander Forbes Jackson thereafter on or about the 22nd day of December, 1893, resumed possession of the said farm and buildings and determined the said agreement.

4. The defendant is the executrix dative of the estate of the late A. F. Jackson and as such is in lawful possession of the said farm.

Wherefore the defendant prays for judgment with costs

Claim in reconvention.

The plaintiff is indebted to the defendant in the sum of £20, being the balance of the price of certain wheat, mealies, and grain bags of the defendant sold and delivered to the plaintiff between the 17th February and the 29th April, 1893, according to the account hereunto annexed, which sum although duly requested thereto the plaintiff refuses to pay.

Wherefore the defendant prays judgment for the same with costs.

[The account referred to in the claim in reconvention claimed the sum of £39 12s. 7d. for eighty-three bags of mealies, three bags of wheat and forty grain bags, less £17 allowed for grazing, and £2 12s. 7d. abandoned, to bring the amount claimed, £20, within the Magistrate's jurisdiction.]

The plaintiff excepted to the defendant's pleas and said that the same involved the question of rights in future and title to land, *the right of occupation to plaintiff exceeding*

the sum of £40 and consequently beyond the jurisdiction of the Court, and he prayed that they might be dismissed.

The plaintiff further excepted to the defendant's claim in re-convention and said that the total account was disputed and credit not admitted and was beyond the jurisdiction of the Court.

The Magistrate overruled these exceptions and gave judgment for the defendant in convention with costs, and for the plaintiff in reconvention for £18 3s. 7d. with costs, and as to the first item in the defendant's account absolution from the instance. The following were the Magistrate's reasons and statement of facts as found by him :

1. Plaintiff is a farmer and the defendant is the widow and executrix dative of the late Alexander Jackson, who in his lifetime was the licensee under the provisions of Act 37 of 1882 of Lot A, Kei Bridge farm, district of Queen's Town.

2. Alexander Jackson died on 14th February, 1894, and defendant was appointed executrix dative to the estate on 29th May, 1894.

3. The licence referred to is for five years, commencing from 1st January, 1891, and terminating on 31st December, 1895.

4. Defendant is in possession of the premises and land in question by virtue of her appointment as executrix dative of her late husband's estate.

5. The late Alexander Jackson applied to Government for permission to absent himself from the land referred to owing to severe indisposition. This was agreed to on 8th March, 1893, and on 26th December of the same year the Civil Commissioner wrote to Bell, Jackson's attorney, stating that the period for which Government permitted his client to absent himself from the land, owing to illness, had expired. This goes to show that the arrangement was of a temporary nature only.

6. On the 29th April, 1893, defendant acting under a general power of attorney from the licensee leased the allotment in question to plaintiff with the buildings thereon, with the exception of one room, for three years from 15th May, 1893. One condition of the lease contract provides that "the lessee shall not without the consent in writing of the lessor or his agent assign, underlet or part with the possession of the said farm or any part thereof."

7. Section 14 of Act 37 of 1882, the Act under which Jackson holds the land from Government, provides that "the interest in land held on licence shall not during the currency of such licence be assignable except under the provisions of the Act." These provisions will be found in

sections 12 and 13, and were not complied with when the contract between Jackson and Hearn was entered into. I am of opinion therefore that this contract was void *ab initio*, and that the allotment in question is an asset in the estate of the late Alexander Jackson and should be treated as such by the executrix dative.

8. I find moreover that Hearn has failed to observe the conditions of the lease itself, notably when he placed Marx and De Bruyn in possession of the premises and lands, and allowed trees growing on the land to be felled without the consent of the licensee or his agent; so that even if the licence contract is good Hearn himself has broken it.

9. Under these circumstances the application for ejectment of defendant from the premises was refused with costs. As to the claim in reconvention I find the following facts proved:

1. When plaintiff (Mrs. Jackson) left the allotment in April or May, 1893, there were some mealies growing on the land. These the defendant Hearn agreed to reap, sell and pay plaintiff for according to market rates, less 6d. per bag for harvesting.

2. Plaintiff is unable to say what mealies were reaped, but Hearn admits that there were seventy-three bags and two bags of cobs and that he sold the mealies to the C.M.R. at Staalklip at 10s. per bag. I think 10s. per bag would fairly represent the market price of mealies at that time.

3. Plaintiff would therefore be entitled to £36 10s. 0d., being for seventy-three bags of mealies at 10s. plus £1 8s. 4d. for forty grain bags at 7d. and 5s. for the two bags of cobs, in all £37 18s. 4d. Against this sum should be set off carriage of mealies to Staalklip, say 3d. per bag, and for reaping 6d. per bag, namely £2 14s. 9d., and for grazing, as admitted by plaintiff, £17.

4. I therefore gave judgment in favour of plaintiff (Jackson) for £18 8s. 7d. with costs. The first item in the account, namely three bags of wheat (675 lb. at 9s. 6d.), I was uncertain about and therefore gave absolution from the instance in respect of this item.

From this judgment the plaintiff now appealed.

Mr. Searle, Q.C., was heard in support of the appeal.

Mr. Rose-Innes, Q.C., for the respondent.

The Court dismissed the appeal.

The Chief Justice said: It is quite clear that the claim in convention ought not to have been brought in the Magistrate's Court, because the Magistrate had no jurisdiction. The 10th section of the Magistrate's Court Act does not apply to a case of ejectment under a tenancy of

this kind, and therefore, without going further into the merits of this part of the case, it is plain that the Magistrate would have been quite justified in giving absolution from the instance on the claim in convention, and if his judgment means anything else then this Court will alter it to absolution from the instance, leaving it afterwards to the plaintiff if so advised to have the question as to the validity of the sub-lease decided in one of the higher Courts, but I do not think that this Court should at the present stage be asked to say that the plaintiff has a valid claim. With regard to the claim in reconvention I have listened attentively to the evidence, and I do not know that any good purpose will be served by my reading it all over again, because the obscurity which undoubtedly exists will not be removed by a fresh perusal of the evidence. The Magistrate seems to have given the matter the most careful consideration and to have gone very fully into the accounts, and he has given the plaintiff the full benefit of any credits to which he is entitled. Under these circumstances, I am of opinion that the appeal must be dismissed with costs.

Mr. Justice Upington concurred.

'Appellant's Attorneys, Messrs. Van Zyl & Buissinne; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.'

SUPREME COURT. (IN CHAMBERS.)

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice.)]

REGINA V. KIESLING AND { 1895.
PIETERSE. { Mar. 19th.

Mr. Giddy applied for an order removing the criminal actions against these prisoners, on the charge of housebreaking and theft, to the Circuit Court at Worcester.

The order was granted.

REGINA V. KIESLING.

Mr. Giddy applied for a similar order in this case.

The order was granted.

GENERAL MOTIONS.

THE PETITION OF EDMUND H. SHARP.

Mr. Buchanan moved for an order authorising the Registrar of Deeds to issue a copy of certain

mortgage bond passed in favour of petitioner by Herbert Sharp, hypothecating certain land and premises known as No. 3, Church-street, Cape Town, the original bond having been lost or mislaid.

A rule *nisi* was granted calling upon all persons interested to show cause on the 12th April why the application should not be granted as prayed. The rule to be published once in the "Government Gazette." Failing cause shown, the Registrar of Deeds to issue a copy of the bond.

COOK AND ANOTHER V. COLONIAL GOVERNMENT.

Mr. Webber moved for leave to plaintiffs to appeal to Her Majesty the Queen in her Privy Council from the judgment of this Court, pronounced on the 11th instant, in the suit between the parties.

The order was granted.

GRUNDLING'S EXECUTOR V. LATEGAN AND OTHERS.

Mr. Innes, Q.C., applied for the issue of an order for the personal attachment of certain of the said defendants for contempt of Court in failing to carry out sub-divisional transfer of the farms Buffelsjachtsfontein and Waterkloof in terms of a judgment of this Court, dated 2nd November last.

Mr. Buchanan for the respondents.

The Court granted the respondents time to comply with its order of 2nd November up to 31st May, respondents to pay the costs.

IN THE INSOLVENT ESTATE OF JAN A. HAARHOFF.

Mr. Benjamin applied for an order requiring William P. Cressey and others to proceed with the objections raised by them to the confirmation of the liquidation and contribution account framed by the sole trustee of the said estate.

Mr. Innes, Q.C., appeared for the respondent.

An order was granted calling upon the respondents to proceed by the 12th April, the question of the costs of the application to stand over.

STRYDOM V. STRYDOM'S TRUSTEE.

This was an application by the defendant for an order that plaintiff do pay the costs incurred by the defendant in certain application for an interdict to restrain the sale of an asset in the insolvent estate of the said Strydom in the Oudtshoorn Circuit Court, and also the costs in the cause.

Mr. Innes, Q.C., for the appellant,
The order was granted.

STEYN'S TRUSTEE V. GOUS.

Mr. Buchanan applied for an order for the removal of the suit between the parties from this Court for trial at the Burghersdorp Circuit Court, to be held on or about the 5th April next. The order was granted.

FOSSATI V. KLEYNHANS.

Mr. Benjamin moved for authority to the messenger of the Court of Resident Magistrate for Albert to attach so much of the inheritance due to the defendant's wife, to whom defendant is married with community of property, out of Grobler's estate, as will satisfy the amount of plaintiff's judgment obtained against the said defendant.

The order was granted.

REGINA V. ZWART, *alias* IZLANT { 1895. AND JANTJES. } March 19th.

Special Justice of the Peace—Jurisdiction—Masters and Servants Act—Compensation. *A Special Justice of the Peace has no jurisdiction to order compensation under Act 15 of 1856, section 13.*

These cases came on review from the Special Justice of the Peace at Brandvlei, Calvinia.

The first accused was charged with contravening Act 18 of 1873, section 4 (1), in having negligently lost certain seven sheep the property of his master. The accused was found guilty and sentenced by the S.J.P. to deliver to his master within a month a donkey of the value of the sheep lost. The second named accused, Jantjes, was also charged with contravening Act 18 of 1873, section 4 (1) in having by wilful breach of duty lost sixteen sheep, the property of his master. He was also found guilty and sentenced to deliver to his master within a week sixteen sheep as compensation for the sheep which he had lost.

Mr. Giddy for the Crown: A Special J.P. has no jurisdiction to order compensation under the Masters and Servants Act, and consequently the convictions cannot be supported.

The Chief Justice said: There appear, to me to be two objections to these convictions; firstly, that a Special Justice of the Peace had no jurisdiction to order compensation for the value of sheep or other stock lost, and even if he had jurisdiction, there is the further objection that the form of the sentence is too vague to be carried out. A donkey of the value of the lost sheep was to be given,

but who was to be the judge of the value of the donkey? Would it be the master to whom the payment was to be made, or the prisoner himself; or was the Magistrate to sit again to decide judicially as to the value of the donkey? Both objections appear fatal, and the convictions must be quashed.

SUPREME COURT. (IN CHAMBERS.)

[Before Mr. Justice UPINGTON.]

GENERAL MOTIONS.

PARKIN AND OTHERS V. LIPPERT { 1895.
AND OTHERS. { March 26th.

Mr. Searle moved for a commission to take the evidence in Cape Town of Richard Shaw Smith,

of Port Elizabeth, secretary of the Aegis Assurance and Trust Company, on behalf of the defendant Lippert.

Order granted, Mr. Shippard to act as commissioner.

IN THE INSOLVENT ESTATE OF MANASSEH WOOLF.

Mr. Maskew moved for authority to the Master to call a fresh meeting for the purpose of electing a trustee.

Order granted.

In re THE ALIWAL NORTH BOARD OF EXECUTORS, IN LIQUIDATION.

Mr. Molteno presented the second report of the liquidators of the Aliwal North Board of Executors Trust and Agency Company (Limited).

The Court ordered the report to lie open for inspection at the office of the Master of the Supreme Court and of the Resident Magistrate of Aliwal North; notice to be given in the "Northern Post."



DIGEST OF CASES

	PAGE
Arbitration — Award — Rule of Court.	
<i>In consequence of a resolution of Parliament that it was desirable to acquire certain properties, including the applicants' premises, for railway purposes, the Government decided to expropriate the applicants' premises and agreed with them in the widest terms to submit to arbitration the compensation "for any loss or damage of whatsoever kind caused or to be caused to the applicants by reason of the said expropriation or consequent thereon," and to have the award of the arbitrators made a Rule of Court.</i>	
<i>Held that, in the absence of partiality or misconduct, the Government cannot successfully resist an application to have such award made a Rule of Court on the ground that the sum is larger than was contemplated by the Government or Parliament at the time when the expropriation was decided upon, more especially as the applicants had, before such resolution, claimed more than the amount ultimately awarded.</i>	
Combrinck & Co. v. Colonial Government	130
Assumption, substitution, and surrogation — Executors — Letters of administration—Ordinance No. 104.	
<i>The substitution and surrogation of executors have been put an end to by Ordinance No. 104.</i>	
<i>Application to authorise and require the Master of the Supreme Court to issue letters of administration in favour of a surrogated executor refused.</i>	
Ex parte Smith.—Re Titterton's Estate	17
Attachment—Goods—Security for costs	
Ross v. Farmer	13

	PAGE
2. —Out-standing debts—Unsatisfied judgment—Eilenberg v. Jacobson & Company	1
Building contract—Termination—Justification—Burns v. Town Council of Cape Town	82
Cession of territory—International law —Private property—Concessions by barbarous potentate — Native customs—Paramount Chief—Treaty of 1814 with Faku—Sir Bartle Frere's Proclamation of 1878—Cession of Pondoland in 1894.	
<i>Before the cession of Eastern Pondoland to the British Crown Sigcau, the Paramount Chief, made certain concessions to the plaintiffs of all the mineral rights in the country, the right to construct a railway, and the right to select a large extent of land as their own property, but, besides searching for graphite in a few spots, the plaintiffs did not act under their concessions, nor did Sigcau grant to them any particular land.</i>	
<i>The native customs did not recognise such concessions, and, even if they did, there was no legal tribunal to enforce rights, but the Chief enjoyed despotic power to grant the rights if he had sufficient power to enforce them.</i>	
<i>After the cession of the territory to the British Crown, and its incorporation with the Cape Colony, the Colonial Government refused to recognise the concessions, whereupon the plaintiffs brought an action to have their rights thereunder declared as against the Government. Held, that the Court was not bound by the principles of international law to declare or enforce the alleged</i>	

	PAGE		PAGE
<i>rights, which could not, before the cession, have been enforced against the then sovereign.</i>		Construction of agreement—"Obtain and purchase"—Restraint upon exercise of legal rights—Proviso to clause.	
<i>In the year 1878 the High Commissioner by proclamation purported to depose Umquikela as Paramount Chief but took no steps to carry the deposition into effect, and continued in several ways to recognise him as Paramount Chief, and after his death, the Government officially addressed Sigcau, his son and successor, by that title.</i>		<i>By agreement between a Mining Company and a Waterworks Company the former undertook during the term of the agreement to "obtain and purchase" all the water required by them for mining purposes from the latter company and from no other person or company whatsoever; provided that nothing herein contained shall prevent the said Mining Company from using any water obtained by it from the mines or from its wells.</i>	
<i>The cession of the territory by Sigcau was founded upon his right to make such cession.</i>		Held, that, the Mining Company were entitled to use for mining purposes water from a mine which they acquired and worked after the date of the agreement and water which they diverted, with the consent of the Kimberley Town Council, from the Municipal area, it being clear that in neither case was the water acquired by purchase or by virtue of any transaction equivalent to a purchase.	
<i>Held, that the Government cannot in this action dispute his title as Paramount Chief.</i>		De Beers Consolidated Mines v. Kimberley Waterworks Company ... 100	
Cook Bros. v. Colonial Government ... 107		Costs.	
Civil imprisonment—Clerk—Magistrate's discretion.		<i>Where an ex parte application was made for an order compelling the trustee in an insolvent estate to file a contribution account, the matter was ordered to stand over so that notice might be given to the trustee.</i>	
<i>Where a Resident Magistrate, in the exercise of his judicial discretion, had refused to grant a decree of civil imprisonment, in respect of an unsatisfied judgment, against a clerk employed in a chemist's shop at a salary barely sufficient to support him,</i>		<i>Afterwards the Court refused the application with costs, as it appeared that the account had been filed the day before the original application was set down for hearing.</i>	
<i>The Court, on appeal, refused to reverse the Magistrate's decision.</i>		Jones v. Vickers' Trustee ... 34	
Field & Co v. Wernikoff ... 26		Derelict Lands Act—Erven—Registration—Notice—Ex parte Jansenville Municipality ... 8	
Company in liquidation—Sale of assets—Confirmation.		Discovery—332nd Rule of Court—Van Noorden v. Van Zyl ... 100	
<i>Where the assets of a company in liquidation had been sold in lots, and the debenture-holders had had ample notice of the sale but had made no arrangements to purchase the assets, and the sale had been confirmed by the High Court of Griqualand, the Supreme Court refused on the application of the debenture-holders to interfere with the discretion exercised by the High Court, or to restrain delivery of the assets to the purchasers.</i>			
Re North-eastern Bultfontein (Limited), in Liquidation ... 9			

	PAGE
General average—Bill of lading—York and Antwerp Rules—Sale of cargo—Interdict.	
<i>Interdict granted to restrain the master of a ship from selling part of the cargo for the purpose of paying expenses of repairs in a port not being a port of refuge; there being no prima-facie ground for holding that the damage to the ship, which was occasioned by the leakage of sulphuric acid improperly conveyed, to the knowledge of the master, in iron drums, constituted a loss for which contribution must be made by the owners of the rest of the cargo who, under their bills of lading, had agreed to be bound by the York and Antwerp Rules of 1890.</i>	
<i>In re "Expestine" ...</i>	53
Guarantee — Action on—Markham v. Frames ...	76
Lessor and lessee—Rent—Tacit hypothec—Attachment—Reasonable ground for belief of tenant's intention to remove goods.	
<i>A lessor, who reasonably apprehends that the lessee will remove movables from the premises leased, is entitled to an order for the attachment of such movables pending an action to recover the rent due.</i>	
<i>Such apprehension is not unreasonable where the rent is long overdue after several applications for payment, and the lessor has reason to know that the lessee had left premises previously hired by him from another person without payment of the rent due.</i>	
Greeff v. Pretorius ...	132
Liquor licence - Act 28 of 1883, section 89—No proof of prohibition.	
<i>W. was charged with and convicted of contravening Act 28 of 1883, section 89, in that he sold liquor to one H, to whom the sale of liquor had been forbidden for a period of twelve months under the 89th section.</i>	

	PAGE
<i>No proof was produced at the trial that H. had been forbidden liquor, nor was there any evidence to show that W. had any knowledge of the prohibition.</i>	
<i>On appeal the conviction was quashed.</i>	
Regina v. Williams ...	20
2. —Act 28 of 1883, section 75—Contravention—Sale without licence—Regina v. Wessels ...	7
Magistrate's Court—Summons—Exception—Damages.	
<i>Where, in a summons in a Magistrate's Court for damages for the wrongful taking and selling of the plaintiff's goods, it sufficiently appears that the amount claimed is intended to represent the value of the goods, it is no ground of exception that the summons ought to have claimed delivery of the goods with an alternative claim for damages.</i>	
Van der Westhuizen v. Cohen Brothers	56
Magistrate's jurisdiction — Set-off or compensation—Counter-claim—Exception.	
<i>In an action in a Magistrate's Court for £18, being for cash advanced, the defendant excepted to the jurisdiction on the ground that he had a counter-claim for £23, but admitted that he owed the £18 to the plaintiff.</i>	
<i>Held, that the defendant's claim was reduced by his admission to £5 and that, as this amount was within the Magistrate's jurisdiction, he ought not to have allowed the exception.</i>	
Kerdel v. Dam ...	25
2. — Act 20 of 1856, section 10 — Ejectment — Agricultural Lands Act, 1882—Sub-lease.	
<i>J., the wife of a licensee under Act 37 of 1882, acting under a power of attorney from her husband, sub-let the land leased to H., but before the expiration of the sub-lease she entered upon the property and resumed possession.</i>	

	PAGE		PAGE
H. sued J. in the Magistrate's Court for ejectment, and judgment was given in favour of J.		certain property which she had bought.	
Held, on appeal, without deciding as to the validity of the sub-lease entered into between J. and H., that the Magistrate would have been justified, owing to want of jurisdiction, in granting absolution from the instance on the claim for ejectment.		<i>Ex parte Minto</i>	99
Hearns v. Jackson	137	Mines and Minerals—Diamondiferous ground —Inspection— <i>Prima-facie</i> evidence of the existence of diamonds.	
3. — Theft—Conviction on separate indictments.		Where the applicants had leased certain ground to the respondents, and under the lease they were entitled to a surrender on the discovery of diamonds in the ground leased, the Court on being satisfied that there was <i>prima-facie</i> evidence of the existence of diamonds in the land in question ordered an inspection of the ground for the purposes of a pending action.	
Where a prisoner was charged on two indictments with the theft of different articles, found guilty, and sentenced to separate terms of imprisonment on each indictment, The Court, on review, quashed the conviction on the second indictment.		London and South African Exploration Co. v. Griqualand West Diamond-Mining Co.	4
Regina v. Blauweroi	53	Minor—Insolvency — Fraud — Ratification — Delivery of title deeds — Power of attorney.	
Marital power—Non-exclusion in ante-nuptial contract—Property registered in wife's name—Leave to transfer without husband's authority —Rule nisi.		The plaintiff's father, two years before his insolvency, purchased a farm in the Transvaal for his daughter and had the same transferred in her name.	
Where a woman married by ante-nuptial contract, the marital power not being excluded, sought to transfer property registered in her name without the assistance of her husband, whose whereabouts were unknown, the Court granted a rule calling upon the husband to show cause why his wife should not be allowed to pass transfer.		Two years after the date of insolvency the defendant, as trustee of the insolvent estate, obtained from the insolvent the title deeds of the farm and a power, signed by the plaintiff, who was still a minor, authorising the transfer of the farm, upon the insolvent's admission that the price of the farm had been paid in fraud of his creditors.	
<i>Ex parte Trower</i>	36	The defendant never took any steps to have the transfer to the minor set aside or to recover the purchase price from the minor assisted by a curator. The plaintiff married while still a minor and was not aware of the delivery of the title deeds until it was discovered by her husband two years after the marriage.	
2. — Non-exclusion in ante-nuptial contract—Mortgage bond.		Nine years after such discovery the plaintiff brought an action to recover	
The Court granted leave to the petitioner, who was married to her husband by ante-nuptial contract, the marital power not being excluded, to pass a mortgage bond, without the assistance of her husband, whose whereabouts were unknown, for the balance of the purchase price of			

PAGE

the title deeds and to have the power declared of no effect.

Held, that, in the absence of sufficient proof of fraud, or of ratification, the plaintiff was entitled to succeed.

Wolff v. Solomon's Trustee ... 72

Minors—Funds in Master's hands—*Ex parte McGibbon — Re Minors McGibbon* ... 35

Minors' portions—Intestacy—Widow—Security.

Where it was clearly for the benefit of minors that the estate of their father, who had died intestate, and who had been married in community, should not be immediately realised to pay their portions, the Court allowed their mother to remain in possession of the estate, she undertaking to find security for payment of the minors' shares, and to educate and maintain them at her own expense.

Re Clark's Estate ... 59

Negligence—Liability of Town Council —Contributory negligence — Contractor's negligence — Proximate cause.

Where two or more acts of negligence have contributed to cause an injury the test of liability for each act is whether the harm complained of is such as a reasonable man should have foreseen as likely to happen.

The liability of one person for his act does not exculpate another person whose negligence has contributed to an injury which he ought to have foreseen as likely to happen.

The Town Council of East London having engaged a contractor to reconstruct a road and to make an excavation immediately adjoining the road, the contractor's servants left some casks of cement standing on one side of the road and placed some large stones near the excavation on the opposite side.

PAGE

The plaintiff's horse, being driven past the casks, shied at the casks and bolted towards the excavation.

When one of the wheels of the cart was a few inches from the excavation the plaintiff jumped from the cart and alighted upon a stone. The horse and cart moved on and escaped unhurt, but the wheel of the cart struck the plaintiff's leg and broke it.

Held, on appeal from the East London Circuit Court, that, although the horse may in the first instance have shied at the casks, if the excavation was improperly made and then left unfenced by the defendants and they ought to have foreseen danger from their negligence, they would have been liable if the plaintiff had fallen into the excavation.

Held, further, that if the plaintiff in jumping from the cart did what a reasonably prudent man, impelled by the instinct of self-preservation, would have done, he was not guilty of contributory negligence and the injury is legally attributable to the existence of the improper excavation, although the contractor may also be liable for improperly placing the casks in the street.

Newman v. East London Town Council 41
Partners — Summons — Non-joinder — Exception.

P. sued R. in a Magistrate's Court upon a promissory note signed by R. and his partner L., the latter being at the date of the issue of the summons domiciled in the S.A. Republic, and not within the jurisdiction.

The Magistrate sustained an exception of non-joinder taken by R.

Held, on appeal, reversing the Magistrate's decision that P. was justified in suing R., the partner within the jurisdiction.

Alcock v. Du Preez (Buch. 1875, p. 130) followed.

Pienaar v. Rattray ... 67

	PAGE		PAGE
Partnership — Application for interdict refused — Freemantle v. Henning	6	Colony, and who remained in A.'s service after B.'s departure, was charged with and convicted of selling liquor without a licence in contravention of the Proclamation 343 of 1894, section 10.	
Plea in abatement—Fire policy—Cession — Proper person to sue.		Held, on appeal, that although the evidence would have been sufficient to justify W.'s conviction for contravening the 4th and 5th sections of the Proclamation, his conviction under the 10th section was wrong, as W. was authorised by A. to sell liquor under the licence granted to his partner B.	
T.'s premises, insured by the defendant company, having been destroyed by fire, the company in terms of its policy undertook to reinstate the premises.		Regina v. Ware	21
Previous to the fire T. had assigned all his right, title, and interest in the policy to S., and had given the company notice of the cession.		Provisional sentence—Mortgage bond — Interest—Lindenberg v. Naude	3
The premises not having been rebuilt to T.'s satisfaction he sued the company for the amount of the policy.		Receipts—Action to compel delivery—Smuts's Trustees v. Van Zyl's Executors.	91
Held, on a plea in abatement, that S. was the proper person to sue, not T.		Rent — Defence — Failure to execute written lease — Repairs — Rogers' Executors v. Jessop	95
Trautmann v. Imperial Fire Insurance Company, Limited	68	Sale of goods—Non-delivery within stipulated time—Onus.	
Prescription — Town Council — Public road—Inalienable land—Consent of Governor—Public square.		In an action on an oral contract for the sale of goods the defendants pleaded, as the defence for their repudiation of the contract, the non-fulfilment of a condition that the goods should be delivered by a specified date.	
Prescription runs as against the Town Council in respect of land forming part of a public square, such land being alienable with the consent of the Governor.		Held, that the onus of proving that no such condition formed part of the contract lay on the plaintiff.	
Jones v. Town Council of Cape Town	27	Clements & Co. v. Vos. — Clements & Co. v. Van Rhyn	34
Proclamation 343 of 1894 — Sale of liquor without a licence—Conviction—Partnership—Servants.		Setting aside judgment—Rule of Court 329 — Entering appearance — Mistake—Mase, Vaughan & Co. v. Malcolm's Trustee	23
In January, 1894, a liquor licence was granted to B., who at that date carried on business at the Royal Hotel, Kokstad.		Shares—Alleged sale — Conflict of evidence — Credibility — Character of witnesses—Walder v. Krynauw ...	31
In the following November, B. left the Colony.		Slander—Publication—Admission.	
Before B. left he handed the business over to A., whom he had taken into partnership some time previously.		The Court, on appeal, refused to reverse a Magistrate's judgment awarding damages in an action for	
On the 29th November, A. applied for a transfer of the licence to him and it was transferred on the 6th December.			
On the 2nd December, W., who was in B.'s service before he left the			

	PAGE		PAGE
<i>slander, where although no evidence of publication had been given, still there was a clear admission in a letter of apology signed by the defendant that she had used the words complained of.</i>		<i>allege in what manner the plaintiffs had been authorised to sue, whether under the articles of association, the trust deed, by resolution of shareholders, by power of attorney, or otherwise.</i>	
Hope v. Illario 136		<i>The Magistrate before whom the case came overruled this exception.</i>	
Special Justice of the Peace—Jurisdiction—Masters and Servants Act—Compensation.		<i>Held, on appeal, upholding the Magistrate's decision, that the exception was bad, as there was a definite allegation in the summons that the plaintiffs were authorised to sue, no attempt having been made by the defendant to disprove that allegation.</i>	
<i>A Special Justice of the Peace has no jurisdiction to order compensation under Act 15 of 1856, section 13.</i>		Stoffel v. Mills and Rethman (Limited) 29	
Regina v. Zwart, alias Izlaunt and Jantjes 140		Tender — Insufficiency — Work and labour—Beetham v. Slanie ... 100	
Splitting of claims—Exception—Slander—Wrongful dismissal—Damages — Magistrate's jurisdiction.		Theft — Remittal—Review.	
<i>R. issued two summonses against F., one claiming £20 damages for slander and the other £20 damages for wrongful dismissal.</i>		<i>Where a prisoner, charged on two counts (1) with contravening Act 35 of 1893, section 25, and (2) with theft, pleaded guilty, and the case was remitted by the Attorney-General for trial on the charge of theft only, and the Magistrate tried the prisoner on both counts, found him guilty, and sentenced him to a term of imprisonment on each charge, the Court on review quashed the conviction on the first charge.</i>	
<i>The slanderous words were spoken and the wrongful dismissal took place on the same date.</i>		Regina v. Sym 13	
<i>The Magistrate, before whom the first case was heard, sustained an exception that there had been a splitting of claims.</i>		2. — Act 35 of 1893 — Evidence sufficient to justify conviction — Regina v. Neethling 65	
<i>Held, reversing the Magistrate's decision, that there was no such legal connection between the two claims as to make a judgment in one decisive in the other.</i>		Transfer duty—Act 5 of 1884—Heirs—Exemption—Registrar of Deeds.	
Ross v. Farmer 24		<i>Husband and wife bequeathed their two farms O. and B. to their seven sons for the sum of £1,400.</i>	
Summons — Exception—Plaintiffs' right to sue—Limited company—Authority.		<i>The testator died first and at his death O. was held by him under a quitrent grant, and B. was held by him on lease from Government.</i>	
<i>A director and the secretary of a limited company issued a summons claiming an amount due for goods sold and delivered to the defendant. The summons alleged inter alia that the plaintiffs were the joint managers of the business, and were duly authorised to collect and sue for all accounts owing to the firm. The defendant excepted to the summons on the ground that it did not</i>		<i>A sum of money was taken out of the estate for the purpose of acquiring B., but the agent who was entrusted with the matter became financially involved and both money and farm were lost to the estate.</i>	

	PAGE		PAGE
One son died leaving issue, and a daughter was born subsequent to the making of the will, so that at the death of the testatrix there were living seven children and the issue of the predeceased son.		The Court, on the application of the defendant, refused to order a postponement until the May Term.	
The executor of the estate obtained an Order of Court sanctioning the conveyance of O. to the heirs for £700; the Court also authorised him to overlook in the transfer two of the six sons, who had neglected to adiate, and to transfer their shares to such of the other sons as might be willing to take them.		Cook Bros. v Colonial Government ...	58
Subsequently two other sons declined to adiate and of the two remaining sons, L. and J., who adiated, L. accepted the four vacant shares and thus became entitled to five-sixths of the farm and J. to one-sixth.		Usufruct—Mutual will — Security — Minors — Administrators — Remarriage of surviving spouse.	
The executor thereupon proceeded to pass transfer of the farm to L. and J. in the proportions of five-sixths and one-sixth respectively, and tendered transfer duty receipts showing an exemption allowed to each of them by the Civil Commissioner of one-eighth of the value (£700) of the whole farm.		Husband and wife, married in community, by mutual will reciprocally bequeathed to the survivor the life usufruct of their joint estate, and appointed the children of the marriage as heirs of such estate subject to the usufruct.	
The Registrar of Deeds took exception to these allowances by the Civil Commissioner and contended that J. was only entitled to exemption upon one-eighth of one-sixth of the value of the farm and L. to one-eighth of five-sixths.		The testator appointed the respondents as executors of his will, administrators of his estate and, in the event of the wife's marrying again, guardians of his minor heirs.	
On application being made to the Court the contention of the Registrar of Deeds was sustained.		The testator died first and some years afterwards the survivor, the applicant, married again, whereupon the respondents claimed the sole control and administration of the joint estate.	
Nolte v. Registrar of Deeds ...	105	Held that, although the applicant might be liable to give security against misappropriation or waste, she was entitled, as usufructuary, to the control and administration of the joint estate.	
Trial — Application for postponement refused.		Furnivall v. Cornwell's Executors ...	14
Where in an action against the Colonial Government the declaration had been filed on the 12th November, the pleadings closed on the 6th December, and the case set down for trial on the 28th February,		Waiver of rights—Marriage in community—Sale of property—Consent in ignorance of rights—Trespass—Damages.	
		Where a woman by virtue of her marriage in community had become entitled to a half-share in certain landed property, and without being fully acquainted with her rights consented to a sale of the property by her children, who were entitled to the other half,	
		Held that, there had been no waiver of her rights, and that she was entitled to succeed in an action for	

	PAGE		PAGE
<i>trespass and damages against the purchaser, who was in occupation of the land.</i>		<i>Writ of arrest refused where no application had been made to the Registrar under the 8th Rule of Court.</i>	
Steenkamp's Executrix v. Wiese ...	60	McCahy v. Williams ...	136
Writ of arrest—8th Rule of Court,			



REPORTS OF ALL CASES
DECIDED
IN THE SUPREME COURT
OF THE
CAPE OF GOOD HOPE,
DURING THE MONTHS OF APRIL, MAY, AND JUNE, 1896.
(WITH TABLE OF CASES AND DIGEST.)

REPORTED BY
J. D. SHEIL,
OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND ADVOCATE OF THE
SUPREME COURT.

VOL. V.—PART II.
(1896.)

CAPE TOWN :
PRINTED AND PUBLISHED AT THE "CAPE TIMES" OFFICE, ST. GEORGE'S ST.
1896.

TABLE OF CASES.

	PAGE		PAGE
African Banking Corporation v. Bond...	209	Duraan v. Grosse...	147
" " " v. Van Broembeen ...	149	D.R. Church v. Snyman ...	147
Aliwal North Board of Executors (in liquidation), re ...	169	Du Toit's and Bloxam's Ante-nuptial Contract ...	211
Badenhorst v. Bloem and Another ...	149	Du Toit's Estate, re ...	248
Bailey v. Vivier ...	149	" " " ...	188
Beedle & Co. v. McLeod...	223	Eaton, Robins & Co. v. Cilliers ...	149
Board of Executors v. Dean ...	147	" " v. Fouchée ...	224
Bond's Insolvent Estate, re ...	221	" " v. Redelinghuys ...	147
Borchards, ex parte ...	147	" " v. Uys ...	147
Borman (minor), re ...	157	Elliott, ex parte ...	148
Bosman & Co. v. Haupt ...	241	Evans, ex parte ...	167
Braude v. Verdoes ...	184	Ferreira v. Du Plessis ...	226
Broad v. Schultze & Smith ...	183	Fletcher & Co. v. James ...	147
Brookfield v. Brookfield ...	171, 211	Fletcher's Executors v. Keytel ...	147
Brown (minor), re ...	228	Fourie, ex parte ...	147
Cape of Good Hope Bank (in liquidation), re ...	143, 172	Friberg v. De Jager ...	161
Cavanagh v. Cavanagh ...	182	Gourlay & Co. v. Simons ...	187, 224
Claasen v. Claasen ...	225	Grand Parade Building Co. v. Nannucci ...	167
Cloete, ex parte ...	241	Grundling's Executor v. Lategaan and Others ...	143
Coleman v. Gerd's Tutors ...	167	Hall, ex parte ...	224
Colonial Government v. Andries ...	146	Hall's Estate, re ...	230
" " v. L. and S. A. Exploration Co. ...	194	Hand & Co. and Others v. Simonhoff ...	149
Colonial Government v. Silo ...	209	Hauptfleisch v. Hauptfleisch ...	153
" Orphan Chamber v. Bester ...	149	Hawkins v. Hawkins ...	187
" " v. Loubser ...	146	Hayward v. Gerd's Tutors ...	207
Cressey and Others v. Haarhoff's Trustee ...	157	" v. Hayward ...	153
Davis, ex parte ...	228	Hepworth & Sons v. Colonial Government ...	251
Day v. Day ...	156	Herman's Estate, re ...	225
De Kock, ex parte ...	171	Heydenrych v. Hubbard ...	147
Dembitzer v. Jacobson ...	172	Heyneman's Trustee v. Loubser ...	185
De Meillon, re ...	169	High Sheriff v. Klynhaus ...	147
Deschamps, Horsley & Co. v. Kretzinger ...	146	Hofmeyr & Regter v. Du Toit ...	146
De Villiers, ex parte ...	147	" " v. Page ...	209
De Villiers, ex parte ...	224	Hollinghurst v. Frame & Co. ...	167, 224
" v. Wolhuter... ...	165	Hooper's Estate, re ...	167
Dickson v. Dickson ...	159	Hopley, ex parte ...	228
" Bayly & Co. v. Saniford ...	146	Hudson, Vreede & Co. v. Cooper ...	171
Drew (minors), re ...	224	Humphries, ex parte ...	148
Du Plessis v. Roux ...	146		

	PAGE		PAGE
Ireland, Fraser & Co. v. Bonamici	... 147	Naude v. Executrix	... 171
Jones v. Town Council of Cape Town	... 172, 183	Nel v. R.M. of Worcester	... 153
Juli's Estate, re	... 144	Nel's Insolvent Estate, re	... 156
Kay, ex parte	... 210	Oppel and Others v. Le Roux and Others	... 151
Kilian's Estate, re	... 225	Osborne, ex parte	... 171
King v. Voigt	... 209	O'Shea v. Port Elizabeth Municipality	... 169, 173
Klaiba v. Klaiba	... 157	Parkin and Others v. Lippert and Parkin	... 211
Koch v. R.M., Van Rhyn's Dorp and Zackon	... 155	Pentony v. Porter	... 159
Koch v. Zackon	... 223	Petersen v. Frame and Wife	... 187
Kohler and Others v. Baartman	... 241	Phillips v. Burger	... 146
Krause, ex parte	... 148	Poppe, ex parte	... 167
Kyd, ex parte	... 143	Preiss, ex parte	... 224
Latriet's Executrix v. Snyman	... 224	Price, ex parte	... 224
Lewis v. Du Toit	... 147	Prins v. Roux	... 224
Lithman v. Horn	... 171	Rautenbach v. Ferreira	... 172
Lloyd's Will, re	... 150	Regina v. Allies	... 185
London and S.A. Exploration Co. v. G.W. Diamond Mining Co.	... 148	„ v. Keyter	... 159
London and S.A. Exploration Co. v. Official Liquidator N.E.B. and Registrar of Deeds, G.W.	... 235	„ v. Van Rooyen	... 220
Loock v Kluyts	... 171	„ v. Vedders	... 159
Marincowitz v. Matthys	... 229	Rodger's Estate, re	... 169
Maskew's Executors v. Van der Walt	146	Rolfe, Nebels & Co. v. Curtis	... 187
„ „ v. Van der Walt (J.D.'s son)	... 146	Rothenburg v. Rothenburg	... 228
Mason v. Mason	... 148	Rudd v. Rudd	... 162
Master v. Gerd's Tutors	... 147	Russouw, ex parte	... 167
„ v. Groenewald's Executors	... 149	Russouw, ex parte	... 210
„ v. Louw's Executrix	... 149	Scheepers v. Scheepers	... 228
Matthys v. Henning	... 163	Scholtz v. Burkes	... 148
Maxwell & Earp v. Nefdt	... 149	Schunke's Insolvent Estate, re	... 229
„ ex parte — re Nefdt's Estate	... 167	Scott's Estate, re	... 187
McColla v. Taylor	... 207	Seale v. Seale	... 170
McIntyre, ex parte	... 146	Sharp v. Sharp	... 169
McLeod v. Beedle & Co.	... 183	Sieberhagen, re	... 153
„ v. Meyers	... 167	Simons v. Simons	... 169, 221
Megone, ex parte	... 143	Slabber v. Neezer's Executor	... 189
Meyer and Others v. Meyer's Executors	248	Slabber's Trustee v. Neezer's Executors	189
Mitchell, ex parte—re Blyth's Will	... 157	Smith v. Black's Executors	... 167
Mill's Executors v. Stellys and Others	188	Smith v. Smith	... 211
Morgenrood v. Morgenrood	147, 149, 169	Snyman's Estate, re	... 143
		South African Association v. Honey	... 224
		„ Mutual v. Mannix	... 149
		„ „ v. Rorich	... 149
		Standard Bank v. Hay	... 224
		„ v. Uys	... 146

	PAGE		PAGE
Steyn's Estate, <i>re</i>...	... 211	Vermaak's Executrix v. Vermaak's Exe-	
Strydom v. Strydom's Trustees ...	... 144	cutors...	... 172, 193
Stark & Co. v. Reeler ...	... 146	Vickers v. Vickers ...	... 188
Stuurman's Estate, <i>re</i> ...	... 148	Visagie v. Visagie ...	... 171
Sutherland Municipality, <i>ex parte</i>	... 153		
Sutton (minors), <i>re</i> ...	... 173	Wessels v. La Grange ...	... 147
		„ v. Snymen ...	... 147
Tasmer's Estate, <i>re</i> ...	... 159	Whelan v. White ...	... 226
Theron v. Barnard ...	... 207	Whipp v. Whipp ...	... 225
Toucher v. Zoer ...	... 201	White (an alleged lunatic), <i>re</i> ...	... 225
Trollip's Estate, <i>re</i> ...	... 225	Wiley & Co. v. Harris ...	... 147
Turner, <i>ex parte</i> ...	... 147	Wilkinson v. Wheeler ...	... 147
Twentyman & Co. v. Zaron ...	... 187	Wilson v. Jafta ...	... 167
		Wolfe v. Wolfe ...	... 188
Van den Heever (minors), <i>re</i> ...	... 188		
Van der Byl v. Reyneke...	... 209	Zoederberg & Duncan v. Klaas & Hellig	167
Van der Spuy Bros. v. Loewenthal	... 209	Ziegler's Trustees v. Liebermann, Bell-	
Van Noorden v. Theron ...	... 146	stedt & Co. ...	... 230
„ v. Van Zyl ...	... 165	Zoer v. Arnold ...	... 149



CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT. (IN CHAMBERS.)

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

CASES REMOVED. } 1895.
April 2nd.

Mr. Giddy applied for the removal of the following criminal cases from the Supreme Court to the Circuit Court to be holden at the Paarl on April 23: The Queen v. Anthony Petrus Keyter, for culpable insolvency; the Queen v. the Same, for fraudulent insolvency, or otherwise theft, or otherwise culpable insolvency; the Queen v. the Same, for theft; the Queen v. David Josephus Strauss, for contravening section 36 of Act 5 of 1884, known as the Transfer Duty Consolidated Amendment Act of 1884; and the Queen v. Petrus Abraham Nel, on a similar charge.

The Chief Justice said: The insolvency cases are important, and perhaps had better be tried at the Criminal Sessions than before a jury at the Paarl sitting as such for the first time.

Mr. Giddy said all the witnesses were from Calvinia, and it would be much more convenient and less expensive if the cases were tried at the Circuit Court.

The application was granted.

Ex parte MEGONE. } 1895.
April 2nd.

Advocate—Admission.

A barrister who applies to be admitted to practise as an advocate of the Supreme Court should be present when the application for his admission is made.

Mr. Innes, Q.C., applied for the admission of William Bernard Megone, of the Middle Temple, as an advocate of the Supreme Court, the oath to be taken before the British Resident in Pretoria.

U

The Chief Justice observed that it was not right for barristers to apply in this casual manner for admission. They should at least make one appearance before the Supreme Court.

Mr. Innes: There are several precedents for the present application.

The Chief Justice: That may be so, but it does not take away from the desirability of counsel making at least one appearance if they think it worth while to be admitted.

The application was granted.

Ex parte KYD.

Mr. Shippard applied for the admission of Alfred Edward Kyd as an attorney.

The application was granted, and Mr. Kyd, who was present, was duly sworn and admitted.

CAPE OF GOOD HOPE BANK.

Mr. Innes, Q.C., applied for the confirmation of a number of compromises, of which notice had been duly given, as required by previous order of the Court.

The compromises were confirmed.

GRUNDLING'S EXECUTOR V. LATEGAAN AND OTHERS.

Mr. Searle, Q.C., applied for an order for the attachment of Anna Elizabeth Maria Ungerer, executrix of her husband's estate, for contempt of the Court's order of the 2nd November last.

An order was made requiring respondent to sign the necessary power of attorney for passing sub-divisional transfer of the farms Buffelsjachtfontein and Waterkloof by May 31; failing compliance or cause shown to the contrary, the Deputy Sheriff to be authorised to sign the power on her behalf. Applicant to have costs.

ESTATE OF THE LATE LOURENS MARTHINUS SNYMAN.

Mr. Buchanan applied for an order granting the executors in this estate a further extension of six months' time within which to pay the minors' portions into the Guardians' Fund.

The order was granted.

ESTATE OF THE LATE JOHN LAURENCE JULI.

Mr. Molteno applied on behalf of Rachel Bowler, executrix testamentary of the estate of her late brother, and guardian of John Edward Juli, for an order authorising her to raise a loan of £120 by hypothecation of erf 11, situate at Claremont, sub-division of the estate Sans Souci, to enable her to pay out Mrs. Eliza Juli, the minor's stepmother, her share, and to meet the expenses incidental to the liquidation of the estate and of this application.

The application was granted.

STRYDOM V. STRYDOM'S TRUSTEE } 1895.
April 2nd.
July 3rd.

Sa' — Postponement—Insolvent's interest in land.

Where the sale of an insolvent's interest in certain land had been postponed for three months by order of Court to enable an action to be instituted to set aside the sale of a life interest in the land, and at the expiration of the three months no action had been commenced, the Court refused to order a further postponement of the sale.

These were two applications. In the first Cornelis Johannes Strydom (the second-named applicant's son) applied for an order restraining the respondent, John Cairncross, in his capacity as the trustee of the insolvent estate of Petrus A. G. Strydom, from selling certain ground specified in a sale notice published by the respondent.

In the second application the insolvent prayed for a similar order against his trustee, John Cairncross.

The facts as deposed in the affidavits are these: The first-named petitioner is an heir under the will of Catherine E. B. Otto, now alleged to be an imbecile. According to an advertisement of sale published by the respondent he proposes to sell on the 3rd instant on account of the insolvent estate of P. A. G. Strydom a certain right to Lot G of Zeekoe River in the division of Oudtshoorn. Catherine E. B. Otto and her first husband, Andries Gabriel Greeff, executed a mutual will on 30th June, 1855, in terms of which certain shares in the farm Zeekoe River were bequeathed to the insolvent (their godchild) subject to a life interest in favour of the survivor (now Mrs. Otto). After the death of Greeff, the survivor in 1879 passed transfer to the second-named applicant of one-half of the shares so bequeathed,

and gave him possession thereof on condition that she should remain in possession of the other half of the property.

In the year 1881 the second-named applicant's estate was sequestrated as insolvent and the half-share of the property which had been transferred to him was sold in his estate and realised £4,300. The trustee also offered for sale the other half, of which Mrs. Otto retained possession, for which the sum of £500 was only bid because, it was alleged, it was not clear to whom the property belonged or on whom it would ultimately devolve.

The trustee finally liquidated the estate without taking any further steps to dispose of the other half-share of Zeekoe River, and in 1890 the insolvent was rehabilitated.

The former trustee having removed from the Colony the creditors last year had another trustee (the present respondent) appointed for the purpose of disposing of the insolvent's interest in the half-share of the property which had been retained by the testatrix.

In September, 1894, the respondent advertised that he would sell by public auction the interest of the insolvent in the remaining half of Zeekoe River.

On 17th September, 1894, the insolvent obtained an interdict at the Circuit Court held in Oudtshoorn restraining the trustee from proceeding with the sale pending an action to be brought by him for a declaration of rights.

This action was brought on 3rd December, 1894, and on the 12th December following judgment was given on an exception taken to the declaration by the trustee, the Court holding that upon the death of the testator the insolvent acquired a vested right of reversion in respect of the farm which by virtue of section 48 of the Ordinance became vested in his trustee before the confirmation of his account. (See *Strydom v. Strydom's Trustee*, 4 Sheil, 429.)

The trustee intends to sell to-morrow (3rd April) the insolvent's rights in the half-share of the farm.

The second-named petitioner alleged that the heirs, under a will executed by Mrs. Otto in 1893, would claim the land as bequeathed to them and would on the 3rd April protest against the sale, and he submitted that in consequence of the second will, the notice of protest, and an impending lawsuit, the proper value of the land would not be realised, whereas if the matter were finally settled, and the trustee, in disposing of the insolvent's rights, could guarantee transfer on Mrs. Otto's decease, the land would realise at least £1,000 more than the deficiency in his estate, which surplus would come to him.

The first-named petitioner contended that the landed property belonged to the estate of Mrs. Otto, and that it would be prejudicial to his interests as an heir were it to be sold on account of the insolvent estate of P. A. G. Strydom.

He alleged that with the object of stopping the sale and for other purposes he took steps at the last Circuit Court held at Oudtshoorn on the 22nd March, 1895, to procure the appointment of a curator to supervise and manage Mrs. Otto's estate.

[At the proceedings before the Circuit Court the learned judge, Mr. Justice Buchanan, declined to declare Mrs. Otto of unsound mind, but all parties consenting Mr. Redmond Barry was appointed *curator boni*.—REP.]

The petitioner alleged that he had requested Barry to take immediate steps to stop the sale, pending an action to be instituted to have it declared that the property belonged to Mrs. Otto's estate, but that Barry declined to intervene on the grounds that he had not yet received his official appointment from the Master of the Supreme Court.

The petitioner finally alleged that he was afraid that Barry would not be able to obtain his appointment from the Master in time to enable him to stop the sale.

The prayer was for an order restraining the trustee from selling the property or any right therein pending an action to be instituted by the curator at the first-named petitioner's instance.

Before proceedings were taken to have Mrs. Otto declared of unsound mind she had sold her half-share in the farm to Mr. G. Olivier, who duly took transfer, and the object of the proceedings before the Circuit Court was mainly to set this transaction aside.

The position taken up by the respondent was: 1st, that Mrs. Otto having adiated and accepted benefits under the mutual will and codicil could not make another will contrary to the provisions of the former will; 2ndly, that the property itself was not offered for sale but only the insolvent's rights thereto; and 3rdly, that the applicants were aware that Mrs. Otto had sold and transferred her right to the property and therefore had no further interest or claim therein.

The respondent further alleged that the debts due by the insolvent estate amounted to £1,300, and that the property was only valued for Divisional Council purposes at £1,200.

That the largest creditors having an interest in the insolvent estate were resident in Oudtshoorn, and it was their desire that the right should be sold as advertised.

Mr. Searle, Q.C., for the applicants.

Mr. Rose-Innes, Q.C., and Mr. Juta, Q.C., for the respondent.

The Court postponed the sale for three months.

The Chief Justice said: It is to the interests of all parties that the disputes about this land should be settled. The Court will therefore order the postponement of the sale for three months so that some understanding may be arrived at, failing which that the curator, if so advised, may institute proceedings against Olivier to have the sale to him by Mrs. Otto set aside. The question of costs will stand over. Afterwards on the 25th June, 1895, C. J. Strydom called upon the trustee to show cause why the order granted on the 2nd April should not be extended for a further period, to enable the applicant to proceed in his own name, at his own instance, with an action against Olivier to have the sale to him by Mrs. Otto set aside on the grounds that she was not of sound mind when she entered into the transaction. The applicant alleged that he had done all he could to induce the *curator bonis* to take action against Olivier, but that as the *curator bonis* declined to take any steps, he (applicant), as an heir under the will executed by Mrs. Otto in 1893, was about to do so. The reasons assigned by the *curator bonis* for not proceeding against Olivier were that (1) Mrs. Otto was quite rational and able to express her wishes, and (2) that she had refused to sign a power of attorney to enable action to be taken against Olivier.

The latter application was heard on 3rd July, 1895 (before Sir Jacob Barry and Mr. Justice Upton), and refused with costs.

Sir Jacob Barry said: We are not satisfied that this is a *bona fide* application, and we also think that the applicant has had ample time in which to bring his action. He has not done so, and the Court will not, therefore, grant this application; it further not appearing that the applicant will be clearly prejudiced by the sale, which is a sale for the purposes of which the trustee was appointed, and which it would unless there were very special circumstances, be his duty to carry out. This sale has been advertised, and we cannot stop it. The application is therefore refused with costs. Leave is granted to make a further application regarding the costs of the former application.

[Applicant's Attorney, C. C. de Villiers; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT. (IN CHAMBERS.)

[Before Sir J. H. DE VILLIERS K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

COLONIAL GOVERNMENT V. { 1895.
ANDRIES. } April 9th.

Mr. Justice Upington mentioned this case, which had come before him as judge of the week from the Resident Magistrate, Cape Town. He said: Andries was charged with contravening the Railway Bye-laws by loitering on the railway premises. The Magistrate, in error, sentenced the man to twelve months' imprisonment with hard labour. The Magistrate had no power to do so. He was under the impression that the man before him was an habitual drunkard, but that was not the charge. In the Court's opinion the conviction must be quashed, inasmuch as the contravention of the bye-law in question was punishable by a fine, which could not now be paid, as the man had suffered imprisonment.

Ex parte MCINTYRE.

Mr. Buchanan applied for the admission of William Henry Cameron McIntyre as an attorney and notary.

The application was granted. The oaths to be taken before the Resident Magistrate, King William's Town.

SUPREME COURT.

[Before Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

PHILLIPS V. A. BURGER. { 1895.
} April 13th.

Mr. Tredgold applied for the final adjudication of defendant's estate.

The application was granted.

DICKSON AND OTHERS V. E. SANDIFORD.

Mr. Sheil applied for the final adjudication of defendant's estate.

The application was granted.

HOFMEYER AND ANOTHER V. C. P. J. DU TOIT.

Mr. Buchanan applied for provisional sentence for £9 12s., being balance due on promissory note.

The application was granted.

STURK AND CO. V. A. E. W. REELER.

Mr. Buchanan applied for the provisional order sequestrating defendant's estate to be made final.

The application was granted.

MASKEW'S EXECUTORS V. G. J. VAN DER WALT.

Mr. Buchanan applied for provisional sentence on a mortgage bond of £450.

Provisional judgment for plaintiff as prayed was granted, and the property declared executable.

MASKEW'S EXECUTORS V. G. J. VAN DER WALT,
J.D.SON.

Mr. Buchanan applied for provisional sentence on a mortgage bond for £200 and interest.

Provisional judgment was granted, and the property declared executable.

STANDARD BANK V. A. J. UYS, SEN.

Mr. Molteno applied for the final adjudication of defendant's estate.

The application was granted.

DU PLESSIS V. F. J. ROUX.

Mr. Tredgold moved for provisional judgment on balance due on promissory note for £32 3s. 9d., less £10 paid on account.

The application was granted.

DESCHAMPS AND ANOTHER V. J. A. KRETZINGER,
J.J.SON.

Mr. Molteno applied for provisional sentence on good-for for £16 4s., promissory note for £36 6s. 6d., promissory note for £36 3s. 8d., promissory note for £80, promissory note for £23 8s. 8d.

The application was granted.

VAN NOORDEN V. J. P. THERON.

Mr. Buchanan applied for provisional sentence on promissory note for £104.

The application was granted.

COLONIAL ORPHAN CHAMBER V. A. J. LAUBSER.

Mr. Jones moved for provisional sentence on mortgage bond for £1,500.

The application was granted, and the property declared executable.

THE MASTER V. GERD'S TUTORS.

Mr. Buchanan moved for an order calling upon the said tutors to file accounts of their tutership.

The usual order was granted.

EATON, ROBINS AND CO. V. J. A. J. UYS.

Mr. Currey moved for judgment for costs.
The application was granted.

FLETCHER'S EXECUTORS V. KEYTEL.

Mr. Tredgold moved for provisional sentence on a mortgage bond for £1,250, less £30 paid on account.

The application was granted, and the property declared executable.

WILKINSON V. WHEELER.

Mr. Watermeyer moved for the discharge of the provisional order.

The application was granted.

IRELAND AND OTHERS V. BONAMICI.

Mr. Tredgold moved for judgment in terms of the consent filed.

The application was granted.

DUTCH REFORMED CHURCH V. W. D. SNYMAN.

Mr. Maskew moved for provisional sentence on a mortgage bond for £2,250, together with £135, the latter amount being interest on the bond at the rate of 6 per cent. from 1st November, 1893, to 31st December, 1894.

The application was granted, and the property declared executable.

WESSELS V. J. A. LA GRANGE.

Mr. Molteno applied for provisional sentence for £17 18s. 2d., being interest at 6 per cent. upon a certain mortgage bond.

The application was granted.

WESSELS V. W. D. SNYMAN.

Mr. Molteno applied for provisional sentence on mortgage bond for £250.

The application was granted, and the property declared executable.

DURAAN V. GRESSE AND ANOTHER.

Mr. Maskew applied for provisional sentence on a mortgage bond for £300, less £221 19s. paid on account.

The application was granted, and the property declared executable.

LEWIS V. H. C. DU TOIT.

Mr. Graham moved for provisional sentence on promissory note for £121.

The application was granted.

BOARD OF EXECUTORS V. F. DEAN.

Mr. Graham moved for provisional sentence on mortgage bond for £1,500.

The application was granted, and the property declared executable.

ILLIQUID ROLL.**FLETCHER V. G. JAMES.**

Mr. Jones moved for judgment for £90 2s. 6d., being £87 10s. for rent and £2 16s. for goods sold and delivered.

The application was granted.

WILEY AND CO. V. B. HARRIS.

Mr. Watermeyer moved for judgment for £49 16s. 6d., goods sold and delivered.

The application was granted.

HIGH SHERIFF V. KLEYNHANS.

Mr. Buchanan moved for judgment for £27 10s., being the second and final instalment of the purchase price of land sold by the Sheriff.

The application was granted.

EATON, ROBINS AND CO. V. J. REDELINGHUYE.

Mr. Tredgold moved for judgment for costs.

The application was granted.

HEYDENBYCH V. HUBBARD.

Mr. Maskew moved for judgment for £18, being due for rent, and £3 10s., being due on two I O U's.

The application was granted.

***Ex parte* FOURIE.**

Mr. Buchanan applied for the admission of Petrus Jacobus Fourie as attorney and notary.

The application was granted.

REHABILITATIONS.

The estates of Jacobus Petrus de Villiers, Mabel Eugenie Turner, and Charles Wm. Borchards were rehabilitated.

THE PETITION OF AMELIA J. MORGENROOD.

Mr. Currey applied for leave for the petitioner to sue *in forma pauperis* in an action against her husband for divorce by reason of his alleged adultery.

The application was granted.

IN THE ESTATE OF THE LATE DANIEL
STUURMAN.

Mr. Tredgold applied for an order to make absolute the rule *nisi* for transfer to the eldest son of the said Stuurman, according to the customs and usages of the Tembu tribe, of certain farm, the property of the estate, situate in the Tambookie location, in the district of Queen's Town.

The application was granted.

MASON V. MASON.

Mr. Molteno applied for an order to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of the respondent's failure to obey the order for restitution to his wife of her conjugal rights, and for an order declaring a forfeiture of the benefits under the marriage in community, and giving the custody of the minor children to the mother.

The application was granted.

LONDON AND SOUTH AFRICAN EX-
PLORATION COMPANY V. GRIQUA-
LAND WEST DIAMOND MINING
COMPANY. { 1895.
April 9th.

Mr. Searle, Q.C., with whom was Mr. Currey, applied for a further order directing Captain Quentrall, the viewer appointed by the Court, to take such further steps by removing the tailings, or otherwise, so as to enable him to locate the exact position of the spots referred to in the affidavits of Calf and Owen, as also the spot or shaft referred to in the affidavits of Van Copenhagen and McLeod, and to inspect the same and the ground in the neighbourhood thereof.

Mr. Rose-Innes, Q.C., appeared for the respondents.

The Chief Justice said: The Court will authorise Captain Quentrall to remove, at the applicant company's expense, as much tailings as he might consider reasonably necessary to remove in order to discover the two holes not yet located in terms of the order of Court dated 14th January, 1895,* costs to be costs in the cause.

SCHOLTZ V. BURKES.

Mr. Shippard applied for the attachment of the farm O, No. 389, in the division of Hay, belonging to the defendant, *ad fundandam jurisdictionem*, and for leave to sue by edictal citation.

The order was granted, and was made returnable on the 1st day of August, 1895, personal service if possible, failing which one publication in the "Diamond-fields Advertiser," the "Bechuanaland News," and the "Government Gazette."

* Vide 5 Shiel, p. 4.

SUPREME COURT.

[Before Sir HENRY DE VILLIERS, K.C.M.G.
(Chief Justice), Mr. Justice BUCHANAN,
and Mr. Justice UPINGTON, K.C.M.G.]

Ex parte KRAUSE. { 1895.
May 1st.

Advocate — Admission — Graduate Cape University — LL.B. degree Cambridge — Admission to the same degree Cape University—Act 16 of 1873, sections 8 and 20.

A graduate of the Cape University and an LLB., Cambridge, admitted to the same degree Cape University, is entitled to be admitted as an advocate of the Supreme Court, although he has not been called to the English or Irish Bar, and is not an advocate of the Court of Session, Scotland.

This was an application for the admission of Mr. Ludwig Emil Krause as an advocate under Act 16 of 1873, sections 8 and 20.

The certificate of Dr. Cameron Registrar, Cape University, which was annexed to the petition was as follows:

I hereby certify that on the 26th day of January, 1895, Mr. L. E. Krause, B.A. (University Cape of Good Hope) and LLB. (University of Cambridge), was admitted to the Degree of Bachelor of Laws in the University of the Cape of Good Hope.

JAMES CAMERON, LL.D.,
Registrar.

Mr. Watermeyer moved.

Mr. Krause was duly sworn and admitted.

[Petitioner's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

Ex parte ELLIOTT.

Mr. Close applied for the admission of Mr. Frank Uhlthoff Elliott as attorney and notary, and that the oaths be administered at Port Elizabeth.

The application was granted.

REHABILITATIONS.

Mr. Close applied for the rehabilitation of the estate of Wm. Timothy Humphries. The trustee's report was favourable.

The application was granted.

Mr. Shippard applied for the rehabilitation of the estate of John Abraham Meyer and Wm. Hudson Meyer. There was nothing unfavourable in the trustee's report.

The application was granted.

PROVISIONAL ROLL.

HAND AND OTHERS V. SIMENHOFF.

Mr. Watermeyer applied for the final adjudication of the defendant's estate.

The application was granted.

BAILEY V. VIVIER.

Mr. Tredgold applied for provisional sentence for £400 and interest from September 1, 1894, on two mortgage bonds.

Provisional sentence, property executable.

MAXWELL AND OTHERS V. NEFDT.

Mr. Tredgold applied for the final adjudication of the defendant's estate as insolvent.

The application was granted.

BADENHORST V. BLOEM AND ANOTHER.

Mr. Close applied for provisional sentence upon a promissory note for £54, less £4 paid on account.

The application was granted.

AFRICAN BANKING CORPORATION V. VAN BROEMBSSEN.

Mr. Watermeyer applied for the final adjudication of the defendant's estate.

The application was granted.

COLONIAL ORPHAN CHAMBER V. BESTER.

Mr. Moltano applied for provisional judgment upon two mortgage bonds of £800 and £200, and that the property especially hypothecated be declared executable.

Granted.

ZOER V. C. B. ARNOLD.

Mr. Tredgold applied for provisional judgment upon a mortgage bond for £800, less £40 paid on account, and that the property specially hypothecated be declared executable.

Granted.

THE MASTER V. GROENEWALD'S EXECUTOR.

Mr. Giddy applied for an order calling upon defendant to file an account in the estate.

The usual order was granted.

THE S.A. MUTUAL INSURANCE COMPANY V. MANNIX.

Mr. Close applied for provisional sentence upon a mortgage bond for £650, and asked that the property specially hypothecated be declared executable.

Granted.

THE S.A. MUTUAL V. PAUL BORICH.

Mr. Close made a similar application upon a mortgage bond for £700, and asked that the property specially hypothecated be declared executable.

Granted.

EATON, ROBINS, AND OTHERS V. J. A. CILLIERS.

Mr. Buchanan applied for judgment for £97 9s. 9d., for goods sold and delivered, with costs.

The application was granted.

MORGENROOD V. MORGENROOD.

Mr. Currey applied for a rule *nisi* requiring applicant's husband to show cause why she shall not be admitted to sue him *in forma pauperis* in an action for divorce by reason of his alleged adultery.

The order was granted, and made returnable on the 19th instant.

MASTER V. LOUW'S EXECUTRIX.

Administration account—Ordinance 104—
Extension—Costs.

Where an executrix, who had been in possession of an estate for five years without filing a final account, had been summoned by the Master under Ordinance 104, and in answer to the summons alleged inter alia that it was impossible for her to file the account until certain of the heirs had paid in moneys due by them to the estate, the Court, under the special circumstances of the case, granted the executrix an extension of four months within which to file the account, but ordered her to pay the costs of the application.

In this case the defendant was summoned to show cause why she had not lodged with the Master a full and true account, together with all vouchers and documents appertaining thereto, of the whole administration and distribution of the estate of the late Nicholas Solomon Louw in terms of Ordinance No. 104.

The defendant filed an affidavit in which she alleged that pursuant to the provisions of her husband's testament she caused the movable property to be disposed of, and framed and filed an account thereof, which showed a deficiency of £128 8s. 5d. to be made up out of the landed property when realised.

That in terms of the will she remained in occupation of the land referred to therein and continued to use the usufruct and rents arising therefrom for the maintenance of herself and family.

That there were living, the issue of the marriage with her late husband, three sons, the eldest being already of age, the second will attain his majority in May, 1895, and the third is a minor of sixteen years of age there being also five daughters, of whom two are married, and three still minors aged 13, 11, and 6 years respectively.

That according to the construction put upon the will of her late husband, which she took to be that of the first dying only, it was her intention to take transfer into her own name of the one half of the landed property and upon payment by her sons of their respective shares of £400 for the benefit of her late husband's estate she was willing to give transfer to them. That all the three sons were living on the farm, that the two eldest were working on their own account, and that the youngest was living with his brothers and at school there.

That unless and until the sons pay in their shares of the £400, which according to her reading of the will has to be invested by her for the maintenance of the minors and support of her daughters until after her death, she had been advised that she would not be justified in passing transfer to them seeing that their shares could not be mortgaged for the amounts due therefor to the estate.

That she was informed that under the circumstances it was impossible for her to frame and file a satisfactory account and that no succession duty was as yet claimable by the Master.

That should the Court hold that she was bound to file an account of the proposed division of the landed property, then she asked for sufficient time to enable her to come to some arrangement with her sons, and that she would be pleased to adopt any suggestions that the Court might seem fit to make.

Mr. Giddy for the Master.

Mr. Searle, Q.C., for the defendant.

The Chief Justice: In the absence of the heirs interested in the will, we think that more than the usual time ought to be given to the respondent to enable her to decide as to what she intends to do. Perhaps the better course

would be to arrange and agree upon a special case, to which all the heirs might be parties, and application might be made to the Court to appoint a *curator ad litem* to the minors, because the defendant could not well represent her children in any action of this kind. Instead, therefore, of the usual time being granted, we shall make an order calling upon the defendant to file accounts within four months.

Mr. Searle: The costs to come out of the estate?

The Chief Justice: No. Five years have elapsed, and she has remarried, but has not filed accounts with the Master. I do not think it is a case where the costs should come out of the estate.

Their lordships concurred.

[Government Attorneys, Messrs. J. & H. Reid & Nephew; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

Ex parte LLOYD. } 1895.
Re LLOYD'S WILL. } May 1st.

Will—Ordinance No 15 of 1845—Signature of testator.

An instrument purporting to be the last will of L. was written on more leaves than one and was signed at the foot by L. and witnesses but was signed only by the witnesses and not by L. on the first leaf.

The contents of the second leaf would be unintelligible without the first leaf.

Held that, as the first leaf was an integral part of the instrument, the second leaf could not be admitted to probate without the first, and that, as the first leaf was not signed by the testator, the instrument could not be accepted as a whole.

This was the petition of Maria Lloyd, widow of the late Henry Thomas Lloyd, and of six major children of the marriage. The petitioner was married in community in the year 1855 to her husband, who died on 7th February, 1895.

On the 9th October, 1888, Lloyd executed what he intended to be his last will and testament, under which he gave his wife a life interest in his estate.

The will was written on four pages of two sheets of paper and was signed at the end and properly attested by two witnesses, who further signed their names by way of attestation on the first page of the will, but on which page the deceased did not sign his name,

The Master declined to recognise the document as a will under the Ordinance, and refused to issue letters of administration to the persons named as executors.

The petitioners and one child of a previous marriage agreed amongst themselves to adhere to their father's wishes as contained in the document executed by him.

The prayer was that the Court would recognise the document as a legal will or as a privileged will, and authorise the issue of letters of administration by the Master to the persons named as executors.

The Rev. Mr. Ritchie, minister in charge of the Congregational Church in Queen's Town, filed an affidavit in which he declared that he knew Lloyd, who was a member of his congregation, that he attended him during his illness, that he had had frequent conversations with him with regard to his affairs, and that about six days before his death he referred to his will and testament, his words being as near as possible as follow: Being asked whether he had made a will for the settlement of his affairs in the event of his death, he answered

"Yes, my will was made out some time back by a legal firm in King William's Town, so that everything will be straight and plain in regard to the disposal of whatever I have to leave to my family. The will provides that Mrs. Lloyd shall have the use of the whole of my means during her lifetime, and after her death I have provided that the property shall go to the unmarried daughters of our marriage, my concern being to secure them against the possibility of their being cast upon the world unprovided for when their home may be broken up by the death of their mother.

"The sons of both marriages can look after their own interests now and are in no want of pecuniary help from me. My only concern is to save the mother and the unmarried girls from a life of hardship after I'm gone. And that is how I have arranged matters in my will. That is all right, and I have no anxiety on my mind in regard to that. The comfort of the mother and her daughters is secured and that is all I am concerned about."

Mr. Benjamin was heard in support of the application and contended that the declaration made to Mr. Ritchie amounted to a nuncupative will and that the document should be recognised as such. He cited *Re Parker* (28 L.J. Prob. 91.)

Even if the whole document could not be admitted as a will, the part which had been executed in terms of the Ordinance, namely the appointment of the executors, might. See *Re Anstee* (L.R. Prob. (1893), p. 288.)

The Court refused the application,

X

The Chief Justice said: The Court is always desirous to give effect to what it conceives to be the last wishes of deceased persons, but it can only do so in accordance with the provisions of the law relating to the execution of wills. The instrument now in question was written upon more leaves than one and, under the 3rd section of Ordinance 15 of 1845, it was necessary that the testator and the witnesses should sign their names upon at least one side of every leaf. Unfortunately the testator did not sign his name on the first leaf although he did so on the last at the foot of the instrument. If the testator had himself written the will there might have been some support for the contention that the instrument is a privileged will, but it is admitted that the writing was done by someone else. The applicant further contends that at all events the leaf which contains the signatures of the deceased and the witnesses ought to be accepted by the Master as the testator's last will, and he relies upon the English case. *In re Anstee* (L.R. P.O. (1893) p. 283) in support of his contention. That was, in many respects, a different case from the present. The part admitted to probate was the first page which had been duly signed by the testatrix only. The disposing parts of the will appeared on the first page and were not affected by the few concluding words of a sentence appearing on the second page. In the present case the second part of the will, which the Court is asked to accept, would be quite unintelligible without the first, which is an integral portion of the will. By giving effect to the second part, without the first, the Court might stultify the wishes of the testator, and thus do the very mischief which the present application seeks to prevent. Even if the English cases cited were in point they would not afford any guidance to the Court seeing that the English law relating to the execution of wills has been greatly altered since the passing of our Ordinance. The provisions of that Ordinance do not admit of the course suggested and the application must therefore be refused but the costs may come out of the estate.

Mr. Justice Upington concurred.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné.]

OPPEL AND OTHERS V. LE ROUX } 1895.
AND OTHERS. } May 1st.

Interdict—Watercourse—Remedy by action.
The Court refused to grant an interdict restraining the respondents from constructing a dam and watercourse, leaving the applicants to their remedy by action.

This was an application on notice to the respondent, that they would be required to show cause why they should not be restrained from making a dam in the Oliphant's River (and a watercourse leading therefrom) between dam "D" and the "Nieuwe Sloot zijn dam," from which dams water is conveyed on to the farm Roodeheuvel, situate in the district of Oudtshoorn, and why they should not pay the costs of the application.

The facts are these:

The farm Roodeheuvel is irrigated partly from the Kamnacie River and partly by the Oliphant's River, being riparian to both rivers.

In 1879, the then proprietors agreed to a sub-division of the land and water rights, and placed all matters in dispute in the hands of arbitrators, who published their award in writing on 12th January, 1880, the award being thereafter made a rule of Court.

Up to the present sub-divisional transfers have not been passed.

At the time of the making of the award there was in existence only one dam in the Oliphant's River from which water was conveyed to the farm Roodeheuvel. This dam is marked "Dam D" on the general plan of the sub-division.

It was provided *inter alia* in the award as follows:

Twentiethly. *We further order, adjudge, and award that the proprietors shall have the right to take out watercourses over each other's ground for irrigating purposes below the present dams, as marked on the annexed plan.*

In the year 1881, the then proprietors, of whom the respondents, both of Roodeheuvel, were parties, agreed to lay a dam lower down in the Oliphant's River than "Dam D," the dam and watercourse leading thereout were made, and have been in use ever since and are known as the "Nieuwe Sloot zijn Dam." The water flowing in this watercourse was distributed in accordance with each owner's share in the land under this watercourse, and they have been in the enjoyment of their rights up to the present time. "Dam D" is situated on an upper farm, namely on the farm Van Wyk's Kraal, and has been in existence from time immemorial.

"Nieuwe Sloot zijn Dam" is situate on the farm Roodeheuvel.

The respondents have obtained permission from the proprietors of the farm Baakens Kloof to lay a dam in their property and convey the water to the farm Roodeheuvel. This dam will be between "Dam D" and the "Nieuwe Sloot zijn Dam."

"Dam D" is distant from the "Nieuwe Sloot zijn Dam" about 3,000 yards. The new dam

about to be constructed will be about equidistant between the other two dams.

The next farm to Roodeheuvel (Oliphant's River side of Roodeheuvel) is Stollsvlakte, then Paakens Kloof, then Van Wyk's Kraal.

The petitioners alleged in effect that the construction of the proposed dam would interfere with the remaining proprietors' present rights, and they prayed for an interdict restraining the respondents from constructing the dam in question.

The respondents alleged *inter alia* that under the provisions of the award a dam and watercourse known as the "Nieuwe Sloot zijn Dam" were constructed by such of the proprietors of the farm Roodeheuvel as were interested to such dam and watercourse, and that the water out of the said dam was distributed amongst such proprietors in proportion to the land which each one had under such watercourse.

That the lands irrigated by the "Nieuwe Sloot zijn Dam," which is lower than "Dam D," were already at the time of its construction under irrigation out of the servitude watercourse "D" and were entitled, as well as the lands which did not come under this new watercourse, to water in proportion to the extent under the said watercourse "D" owned by each proprietor, and the said new watercourse was constructed simply to improve the supply of water on such lands, and the "Nieuwe Sloot zijn Dam" did not bring any more or further lands under irrigation, and irrigated only the lower portion of the lands of the farm Roodeheuvel, but the watercourse leading therefrom has been so constructed that the proprietors served by both dams, with one or two exceptions, can use the water of both dams in either of the watercourses.

That the greater part of the lands owned by the respondents and by other proprietors of Roodeheuvel were not brought under irrigation out of the "Nieuwe Sloot zijn Dam," and that none of the applicants own land above the "Nieuwe Sloot zijn Dam." The respondents submitted that as against the applicants, as proprietors of land under the "Nieuwe Sloot zijn Dam," they were entitled to a reasonable share of the water for irrigating their lands on the farm Roodeheuvel above the "Nieuwe Sloot zijn Dam" so long as they took the water below "Dam D," and that this was the meaning and effect and the provisions of the award.

The respondents finally alleged that it was not their intention to divert more than a fair and reasonable share of the water for the purpose of irrigating their lands above the "Nieuwe Sloot zijn Dam," regard being had

to the extent thereof under the proposed new watercourse, and to the extent of the lands under the "Nieuwe Sloot zijn Dam."

Mr. Searle, Q.C., for the applicants.

Mr. Juta, Q.C., for the respondents.

The application was refused with costs.

The Chief Justice said: The Court is of opinion that the present application must be refused with costs, with leave to the applicants to recover the costs in any action which they may subsequently be advised to institute against the respondents.

[Applicant's; Attorneys. Messrs. Fairbridge, Ardenne & Lawton; Respondents' Attorneys, Messrs. Tredgold, McIntyre & Bisset]

HAYWARD V. HAYWARD. { 1895.
May 1st.

This was an action for restitution of conjugal rights, failing which for divorce, instituted by Mrs. C. F. Hayward against her husband on the grounds of his malicious desertion.

The declaration alleged that the parties were married on 21st July, 1890, and that the desertion took place in 1893.

Mr. Tredgold appeared for the plaintiff.

The defendant was in default.

Norman Lacy, a clerk in charge of the Marriage Register at the Colonial Office, said that the marriage between Charles M. Hayward and Carolina Frederica Heydenrych took place at the Dutch Reformed Church, Cape Town, on July 21, 1890.

Caroline Frederica Hayward, the plaintiff, said that her maiden name was Heydenrych. She was married to Charles M. Hayward at the Dutch Reformed Church, Cape Town, on July 21, 1890. Her husband lived with her for three years, during which time they lived happily. Respondent's occupation was that of an hotel-keeper. Applicant was nineteen years of age at the time of her marriage. Previous to her marriage she tried to find out where her husband came from, and she understood that he came from Manchester, England. She could get no information from him as to his relatives or his past life. To her knowledge he never received letters from anybody. One child, which had since died, was born of the marriage. The parties were married in community of property. When he left her it was not her fault, but because he had got badly into debt, and had forged her father's name. She did not know where he had gone, and he did not ask her to go away with him. He left by one of the English mail boats—she believed the Roslin Castle. Since he had left she had had to keep

the home together by dressmaking. Since he had left she had heard nothing of him. There was no property. She was willing to live with her husband if he returned.

The Court granted a decree of restitution of conjugal rights, with costs, defendant to receive plaintiff on or before July 15, failing which defendant to show cause on 1st August why a decree of divorce with costs should not be granted.

HAUPTFLEISCH V. HAUPTFLEISCH.

Mr. Benjamin applied for an order to make absolute the rule nisi for dissolution of the marriage subsisting between the parties by reason of the respondent's failure to obey the order for restitution of his conjugal rights, and for an order that the custody of the minor child of the marriage be given to the father, and that Mr. A. P. de Villiers be appointed receiver for the division of the joint estate.

The application was granted.

THE PETITION OF THE MUNICIPALITY OF SUTHERLAND.

Mr. Sheil applied to make absolute the rule nisi issued under the Titles Registration and District Lands Act for the attachment and sale in execution for the payment of the rates and taxes due thereon of certain lots of land in the village of Sutherland.

The rule was made absolute.

IN THE MATTER OF THE MINOR WILLIAM G. SIEBERHAGEN.

Mr. Maskew applied for the sanction of the Court for the sale to the said minor of certain farms situated in the district of Richmond, from the estate of his parents, and for the appointment of a guardian to assist him in passing the necessary bond to enable him to obtain transfer in terms of the said deed of sale, and that Mr. A. P. de Villiers be appointed curator.

The application was granted.

NEL V. THE RESIDENT MAGISTRATE { 1895. OF WORCESTER. { May 1st.

Commitment to custody—Bail—Warrant
A Magistrate, being satisfied from the examination of an insolvent that there was sufficient prima-facie evidence of his having committed culpable insolvency, in the interests of justice and with a view to further proceedings, ordered the insolvent to find bail without having previously issued a warrant for his apprehension.

An application by the insolvent to have the proceedings set aside as being illegal was refused with costs, the applicant being in no way prejudiced by the conduct of the Magistrate.

This matter came before the Court on notice to the respondent that he would be required to show cause why the commitment to custody by him of the applicant on the 26th February last should not be declared to be illegal and be set aside or discharged, and also why the bail bond entered into by the applicant and by Messrs. Joubert and Nel, senior, in order to obtain the release from custody of the applicant should not be ordered to be cancelled, and why the respondent should not be adjudged to personally pay the costs attending the present application.

The following are the facts as deposed to by the applicant in his affidavit, the material allegations of which are as follow :

1. I reside in Worcester.
2. On my application my estate was recently placed under sequestration by the Honourable the Supreme Court.
3. The second meeting of creditors in my estate was held at Worcester on the 26th February, 1895, before the Resident Magistrate of Worcester, the respondent above named.
4. At that meeting I appeared, and I was sworn and examined touching my affairs. I answered all questions put to me.
5. My examination was mainly conducted by Mr. Chas. Home, jun., of Worcester, an attorney-at-law, who appeared at the meeting on behalf of one of my creditors.
6. At the close of my examination the said Charles Home remarked that he thought mine was a case in which the Magistrate should demand bail and, that I should be dealt with similarly to Mr. Du Plessis, also an insolvent, who was committed about a fortnight before for culpable insolvency.
7. The respondent thereupon stated that he was of the same opinion, and addressing me he said "You will be kept in custody."
8. The respondent thereafter remarked that I could be released from custody provided I furnished similar bail as Mr. Du Plessis, viz., myself in £100 and two sureties in £50 each.
9. After this the Chief Constable, one Thacker, who was present all the time, addressing me remarked, "Mr. Nel, you cannot leave the Court; you are in my custody."
10. Under these circumstances I communicated through Mr. J. C. Winterbach with my father Mr. W. A. Nel, senior, and Mr. J. J.

Joubert, of Worcester, and was released from custody on their signing with me the bail bond, whereof I attach a copy.

11. No warrant was issued or granted by the respondent authorising the proceedings aforesaid, which were conducted on his verbal order in manner aforesaid.

12. On the 27th February, 1895, in company of the said Mr. J. J. Joubert I proceeded to the office of the respondent and requested to be informed upon what warrant or authority I had been so dealt with, when he replied that he had not committed me to prison under any warrant, but acted under instructions from the Attorney-General. He further also denied having committed me to prison or given me in charge.

13. The respondent then called the Chief Constable to him and in our presence asked him whether he, the respondent, had given me into his charge, whereupon the Chief Constable replied, "Yes sir, you did, and if Nel had not found bail I would have taken him to gaol."

14. I respectfully submit that I have been dealt with in an illegal manner by the respondent, and that I am entitled to have the said proceedings set aside.

The respondent in his answering affidavit alleged *inter alia* that at the insolvent's second meeting he was examined on oath and his evidence reduced to writing, and that having the applicant's own sworn statement before him (respondent), which showed a *prima-facie* case of culpable insolvency, he deemed it to be in the interests of justice to demand bail from the applicant with a view to further proceedings being taken against him, and that he accordingly intimated to the applicant that he would be required to find bail, himself in £100 and two good and sufficient sureties each in £50, and that such bail was furnished shortly after to the respondent's satisfaction.

That on the 23rd March last a preliminary examination for culpable insolvency was commenced against the applicant, and that the case was remanded until the 25th April for further evidence.

In a replying affidavit the applicant stated that his grievance was that without a formal charge made, and without any warrant issued, he was committed to custody by order of the respondent, and was compelled to furnish a bail bond of himself and two sureties before he could obtain his liberty, and that it was a fact that up to the present no warrant of any kind had been issued against him by the respondent.

The bail bond entered into by the applicant and his sureties was the ordinary recognizance under Ordinance 40, section 55.

Mr. Graham, for the applicant: It is submitted that the proceedings were irregular, as the Magistrate should have issued a warrant before demanding bail. Every prisoner is entitled to a warrant or summons setting forth the offence with which he is charged. *Regina v. Cooper* (Buch. 1879 p., 154.)

Again the Magistrate should have proceeded under Act 38 of 1884, section 7, and submitted the evidence to the Attorney-General if there were reasonable grounds for suspecting that the respondent was guilty of culpable insolvency. His action in arresting the applicant without complying with the section was illegal, and the proceedings and bond should now be set aside.

Mr. Schreiner, Q.C., A.G.: Before the passing of Act 38 of 1884 a magistrate had power to arrest a man suspected on reasonable grounds of having committed culpable insolvency. The effect of section 7 is not to limit that power but rather to insure a prosecution if there are reasonable grounds.

The applicant suffered no prejudice by the kindly act of the Magistrate in not issuing a warrant as he might have done, and it does not lie in the applicant's mouth to take a technical exception that bail was required before the issue of a warrant.

Mr. Graham, in reply: The offence with which the applicant was charged is a statutory offence and the Magistrate should have had some deposition or sworn testimony before him to justify his conduct. Ordinance 73, section 11, does not apply to proceedings like the present.

The application was refused with costs.

The Chief Justice said: The proper course on the part of the Magistrate would have been to have issued a warrant for the arrest of this man before ordering bail to be found. No possible prejudice could have been done to the man because he was asked to give bail without being arrested on a warrant. The indignity would have been very much greater if the warrant had first been issued and he had been arrested under it. The case goes to show that it is far better for magistrates to follow the procedure provided by law than to act for the benefit of the person interested, as they may afterwards be brought to book. I am of opinion that the application must be refused.

Mr. Justice Buchanan concurred, mainly on the ground that the applicant was not in any way prejudiced.

Mr. Justice Upington concurred.

The Attorney-General applied for costs.

The Chief Justice: I wish to say nothing about costs.

Mr. Justice Buchanan: In criminal matters as a rule costs are not given; but in this case, as it is a personal matter between the applicant and the Magistrate, and as the applicant asks for costs and has failed in his application, I think that, under the circumstances, it is very reasonable that he should pay the costs.

[Applicant's Attorney, G. Montgomery-Walker; Respondent's Attorney, C. C. de Villiers.]

KOCH V. ZACKON AND THE R.M. OF VAN RHYN'S DORP. { 1895.
May 1st.

Magistrate's Court—Rehearing of case.

In an application on behalf of the plaintiff, against whom judgment had been given by a Resident Magistrate's Court, for an order to compel the Magistrate to re-open the case on the ground that he had refused to hear certain witnesses produced on behalf of the plaintiff,

Held, that the plaintiff ought to have tendered his witnesses for examination in the Court below, and requested the Magistrate to make a note of such tender, and that in the absence of clear proof of the Magistrate's refusal to take their evidence the application ought not to be granted.

This was an application on the following notice of motion addressed to the respondents:

Sirs,—Take notice that application will be made to this Honourable Court by motion on the 12th day of April next at ten o'clock in the forenoon, or so soon thereafter as counsel can be heard, at which time you are required to show cause if any:

(1) Why an order in the nature of a mandamus shall not be granted requiring you the said Magistrate of Van Rhyne's Dorp to re-open the hearing of a certain interpleader suit wherein the above-named applicant was plaintiff and the above-named respondent, Samuel Zackon, was defendant, which suit was in part heard before you, the said R.M., on the 21st day of January, 1895, and in which you delivered judgment against the said plaintiff before his, the plaintiff's case, was closed and further requiring you, the aforesaid R.M., to allow the plaintiff to adduce the evidence of the witnesses who on the aforesaid day were present to testify on his behalf.

Or in the alternative:

Why the applicant shall not during the ensuing term of this Honourable Court be permitted to prosecute his appeal against the

aforesaid judgment notwithstanding that the time allowed him to do so shall have elapsed.

(2) Why you or the one or the other of you shall not be ordered to pay the costs of this application.

(3) Why such further or other relief in the premises shall not be granted to the applicant as shall to this Honourable Court seem meet.

The present proceedings arose out of a certain interpleader suit heard before the R.M. of Van Rhyn's Dorp on the 21st January, 1895, and in which Zackon claimed as against Koch, the plaintiff, that an ox attached by him in execution of a judgment obtained by him against one Koopman should be declared executable.

Koch's case was that the ox had been sold to him by Koopman, his shepherd, notwithstanding the fact that the ox still bore Koopman's mark.

According to the affidavits of the applicant and his witnesses, after the applicant and his brother had given evidence the R.M. interrupted the proceedings and said that he considered that the plaintiff (Koch) had been very careless in not marking the ox with his own mark, that he thought that the plaintiff should be made to suffer for his carelessness, that he wished it to be a lesson to all farmers, and that therefore he would declare the ox executable.

The Magistrate in his answering affidavit denied the above statement, and alleged that when the evidence of Koch and his brother had been given, he asked the claimant's agent if he had any more witnesses, and that he replied in effect that he did not think it necessary as the evidence given was, in his opinion, sufficiently satisfactory and prayed for judgment with costs.

That he (the R.M.) thereupon proceeded to deliver judgment and declared the ox executable.

That not at any time during the hearing of the case did he (the R.M.) interrupt the proceedings as stated by the applicant.

Several witnesses who were present in court corroborated the Magistrate's version of what took place.

It did not appear from the record that the applicant tendered any further evidence after he and his brother had given their evidence.

Mr. Graham for the applicant.

Mr. Juts, Q.C., for the respondent.

The application was refused with costs.

The Chief Justice said: The Court is asked to establish a dangerous precedent. Parties to suits, as well as their agents or attorneys, are frequently much disappointed with the result. To grant this application would be to open a door to disappointed litigants for re-opening

cases which they have lost through their own negligence. They might neglect, or even be unable, to produce witnesses in support of their case in the Magistrate's Court and, when they find that the decision is against them, turn upon that Court by means of an application to this Court for a re-hearing on the ground that the lower Court had refused to hear all their witnesses. Of course, if a magistrate refuses to perform his duty, there is a means of compelling him to do so, but the evidence of his refusal must be clear and conclusive. In the present case the evidence on the point is most contradictory, and not only so, but the applicant admits that he did not formally tender any witnesses for examination or request the Magistrate to note his objection to the further hearing without examining such witnesses. It appears also that after judgment had been given, he noted an appeal against the judgment. If he had intended to take advantage of the Magistrate's alleged illegal refusal to hear more evidence he would surely have raised his objection there and then and not have noted an appeal on the merits of the case. In my opinion there would be no justification in the present case, on the ground stated by the applicant to order the Magistrate to reopen the case, and the application must be refused with costs.

Their lordships concurred.

[Applicant's Attorney, W. E. Moore; Respondents' Attorney, G. Montgomery-Walker.]

DAY V. DAY.

Mr. McLachlan applied that the dates when the order of the Court in this case were made returnable might be extended from May 1 and May 15 to August 1 and August 15.

The Court granted the application.

SUPREME COURT.

[Before Mr. Justice BUCHANAN and Mr. Justice UPINGTON, K.C.M.G.]

IN THE INSOLVENT ESTATE OF { 1895.
ANDRIES J. P. NEL. { May 2nd.

Mr. Buchanan moved for the appointment of a provisional trustee or trustees for the administration of the said estate, no election having been arrived at at the second meeting of creditors.

The Court granted an order appointing M. P. Fitzgerald and W. J. Orsmond joint trustees to liquidate the estate.

IN THE ESTATE OF THE LATE JOHN W. HOOPER.

Mr. Molteno moved for an order removing Thomas S. Sheard from his trust as one of the executors of the said estate, by reason of his disappearance from his duties, and the subsequent sequestration of his estate.

Order granted.

IN THE MATTER OF THE MINOR JAN A. BORMAN.

Mr. Close moved for authority to the mother and natural guardian of the said minor to raise a sum of money on mortgage of certain farm known as Klein Doorn Pan, in the district of Prieska, for the purpose of buying stock for farming and discharging debts incurred.

Order granted.

KLAIBA V. KLAIBA.

Mr. Graham moved for an order to make absolute the rule nisi for dissolution of the marriage subsisting between the parties by reason of the respondent's failure to obey the order for restitution to his wife of her conjugal rights.

Order granted.

Ex parte MICHELL. } 1895.
Re BLYTH'S WILL. } May 2nd.

Executor and trustee—Removal.

Where an executor testamentary and trustee applied to be relieved of his duties and trusts, on the grounds that owing to ill-health his medical advisers had recommended him to visit Europe, the Court relieved him from his office of trustee

This was the petition of Lewis Loyd Michell, one of the executors and trustees appointed by the will of the late Captain Matthew Smith Blyth, who died on the 16th July, 1899.

The will was duly proved and letters of administration were granted to the petitioner and to Elisabeth Cornelia Blyth, widow of the deceased.

Mrs. Blyth has for some time past been residing in England, and the petitioner has been managing the affairs of the estate on his own behalf as such executor, and under a power of attorney granted to him by his co-executrix.

The petitioner alleged that he had lately been advised to leave the Colony on a visit to Europe

on account of ill-health, and acting under medical advice he was desirous of being relieved of his duties and trusts.

That he had duly made up previous accounts of the estate and the same had been submitted to and approved of by his co-executrix. The accounts up to 31st December, 1894, had also been made up and submitted, but the absence of his co-executrix from the Colony had prevented the receipt of a reply from her on the subject.

That the S.A. Association were a fit and proper body to be appointed as executor and trustee in the room of the petitioner, and the co-executrix was willing to agree to their appointment.

That the petitioner had in the meantime during his anticipated absence from the Colony and pending the appointment of a fresh executor and trustee in his place and stead appointed the S.A. Association to act for and on his behalf.

The prayer was that the petitioner might be relieved and discharged from his duties from 31st December, 1894, and the S.A. Association appointed in his place, or that the Master might be authorised to take the necessary steps for appointing another executor and trustee.

The co-executrix consented to the petitioner being relieved of his trusts and to the S.A. Association being substituted in his place.

Mr. Watermeyer for the petitioner.

The Court relieved the petitioner from his office of trustee and appointed the S.A. Association trustees in his place.

The petitioner to continue executor and to be liable to the estate for administration up to the date of his release from trusteeship.

[Petitioner's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

CRESSEY AND OTHERS V. HAAR- } 1895.
HOFF'S TRUSTEE. } May 2nd.

Insolvency—Proof of debt—Withdrawal without order of Court—Costs.

A creditor, who has proved a claim in an insolvent estate, may withdraw the claim without an order of Court, but he remains liable for his share of costs incurred bona fide by the trustee prior to the date of withdrawal.

This was an application on notice to the respondent that he would be required to show cause:

(a) Why the names of the applicants should not be removed from the contribution account filed by him in Haarhoff's insolvent estate,

(b) Why he should not be ordered to pay the costs of the applicants in certain proceedings instituted by him against the applicants, requiring them to show cause why they should not proceed with certain objections taken by them to the account filed by the respondent.

(c) Why he should not be ordered to pay the costs of this application *de bonis propriis*.

The facts as deposed to by the first-named applicant are as follows: The applicants were placed upon the list of contributories in the distribution account filed by the respondent in Haarhoff's insolvent estate. They objected to be placed on the list or in the account, or otherwise to be held liable to contribute to the deficiency in the estate by reason that they had given notice to the respondent of the withdrawal of their proofs of debt.

On October 9, 1894, the applicant gave the respondent notice, on his own behalf and on behalf of the other applicants, that their proofs of debt were withdrawn, and that it was after this notice had been given that the costs were incurred by the respondent which have led to a deficiency in the estate, and that at the time of the withdrawal there were sufficient funds in the hands of the trustee to have paid all the costs of liquidation up to date.

The applicants would have instituted proceedings to have had their names removed from the contribution account had they not thought that the more proper and convenient course would be for them to wait until called upon to make payment to the trustee of a share in the deficiency. The applicant alleged that it was at no time intimated to him that it was the intention of the respondent to require the applicants to proceed formally with the objections of which notice had been given to the Master.

The respondent in his answering affidavit, alleged that at the meetings held in the estate he represented the majority of creditors, whose claims amounted to about £277 17s. 4d., the total claims of the applicants, proved by Cressey, amounting to £38 14s. 9d.

That a sale in execution of the greater part of the assets of the estate was held by the acting messenger of the Court on the day on which the schedules were presented to one of the judges of the Supreme Court, and when the telegram arrived announcing the acceptance of the surrender, the applicants, R. Mortimer & Co., had been paid their *pro rata* share in the writ, but nobody else. The applicant Cressey, who acted for Mortimer & Co., was most of the time with and assisted the messenger in arriving at a distribution.

That on the advice of counsel, which was taken on a resolution of creditors, the respondent in

his capacity proceeded against the messenger and obtained judgment. The messenger then surrendered his estate (valued at about £16), which was accepted.

That as far back as July, 1894, counsel advised that the estate should proceed against G. G. Frieslich (the Resident Magistrate), but in order to keep the case out of court time was given the Magistrate to come to an arrangement with creditors. He made no reply, and process was issued; and it was only on the 9th October that the applicants withdrew their claims without assigning any reason. The respondent further alleged that he was advised that he could not take any notice of the applicants' letters, and that they should obtain an order of Court to have their claims (which were very small) expunged.

That when he commenced the action against the Magistrate he was advised that no further resolution of creditors was necessary.

The respondent finally alleged that in all the proceedings taken by him he had tried to do his duty to creditors, and in no instance had he acted without advice.

Mr. Rose-Innes, Q.C., for the applicants. There appears to have been no resolution of creditors authorising the trustee to bring the action against the Magistrate. But he had power to do so—see section 50, Ordinance 6 of 1843. *Wilson's Trustees v. Wilson* (4 Juta, 209)—and the creditors who oppose the action are still held responsible for its consequences. *Van Heerden v. Goosen's Trustees* (4 Juta, 41).

Under such circumstances the only course is to give notice withdrawing the proof of debt. Such notice must be sufficient or else the minority is at the mercy of the majority or of the trustee.

There is nothing in the Ordinance to prevent the withdrawal, the 27th section says that the Court may admit or reject, but that means at instance of an objecting party, not of a party who wishes to withdraw. It is clear from the affidavits that the applicants objected to the contribution account. There is no proceeding under the Ordinance for objecting to a contribution account, the 110th section only applies to the plan of distribution.

Mr. Benjamin for the respondent: No section of the Ordinance justifies a creditor in withdrawing his claim without applying to the Court. The general policy of the Ordinance appears clear from the 27th section. He referred to the 273rd Rule of the London Court of Bankruptcy framed under the Act of 1869.

Mr. Justice Buchanan said: The question at issue is a very simple one. It is whether a creditor, having once proved his debt, can with-

draw his proof altogether from the record without an order of Court. Now I should say that everyone has a right to withdraw his claim, unless the law prohibits him from so doing. There is nothing whatever in the Insolvent Ordinance which forbids a creditor from withdrawing his claim, and as a matter of practice it is done every day. A creditor, for instance, may have proved a preferent claim against an estate: objection is taken by the other creditors or by the trustee to the preference, and without any order of Court that creditor withdraws his preferent claim and the administration of the estate goes on without interruption. No doubt a creditor must remain bound for his share of any liability incurred before the date of his withdrawal. In this instance we are of opinion that the applicants could withdraw their claims, but it must be distinctly understood that they are liable for everything done by the trustee previous to their withdrawal. They are liable for the action instituted against Mason, and for any costs incurred in a *bonâ-fide* manner up to the date of their notice. But from that time, after having given notice to the trustee, they are not liable for any further costs incurred. In this case, however, we think the trustee acted *bonâ fide*, and that he is justified in coming to the Court to oppose this application, and under these circumstances we have come to the conclusion that costs should not be given *de bonis propriis*, but should come out of the estate. The application will be granted so far—that the applicants are not to be held liable for any costs incurred after the date of their withdrawal.

Mr. Justice Upington concurred.

[Applicants' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondents' Attorneys, Messrs. Van Zyl & Buissinné.]

IN THE ESTATE OF THE LATE { 1895.
RUDOLPH TASMER. { May 2nd.

Mr. Watermeyer moved for authority to the executor testamentary to dispose of certain live-stock, the property of the estate, and to deposit the proceeds, after payment of debts due, in the Guardians' Fund to the credit of the minor heirs, it being inadvisable in their interests that the said cattle should be retained any longer.

The Court made no order.

AFTERNOON SITTING.

[Before Sir J. H. DE VILLIERS (Chief Justice),
Mr. Justice BUCHANAN, and Mr. Justice
UPINGTON.]

DICKSON V. DICKSON. { 1895.
May 2nd.

Mr. Watermeyer moved for an order to make absolute the rule *nisi* for the dissolution of the marriage existing between the parties to this suit owing to failure by the defendant to obey the order of Court to restore to her husband his conjugal rights.

The Chief Justice said: The rule *nisi* ordered that the order of Court should be served on the respondent, but that has not been done; the citation only has been served by the plaintiff's attorneys. But under the special circumstances in this case, we will allow this application to be made without further service, because it is quite clear that the original citation was served on the respondent; and as this notice of the attorney was in accordance with the citation, no injustice will be done, and the Court will therefore make the rule absolute. But in future the Court will not do so unless the order of Court has been served.

PENTONY V. PORTER.

Mr. Graham moved to make absolute the rule *nisi* for an interdict restraining the respondent from parting with or otherwise disposing of certain two promissory notes, and from selling a restaurant business in which applicant was admitted a partner.

Order granted.

REGINA V. VEDDERS. { 1895.
May 2nd.

Liquor—Sale without licence—No evidence of sale—Conviction quashed.

V. was convicted by a Magistrate of contravening Act 28 of 1883, section 73, by selling liquor to one R. and others without having the licence required by law.

There was no evidence whatever of the sale of the liquor; but V.'s wife admitted that she had given some sherry, which had been left at the house by a visitor some few days before, to two of the men.

On appeal the conviction was quashed.

This was an appeal from a sentence passed upon the appellant by the Resident Magistrate of Knysna.

The appellant was charged with contravening Act 28 of 1883, section 75: In that upon or about the 22nd February, 1895, and at or near Balmoral in the district of Knysna, the said Vedders did wrongfully and unlawfully sell or otherwise dispose of a quart bottle full of intoxicating liquor or some greater or less quantity thereof to Edward Bibbey, William Ralph, and Paul Peter Bornemeza without the licence required by law.

The facts as proved by the evidence are briefly these:

The appellant is a general dealer carrying on business in what is known as the Balmoral Hotel, which is an accommodation house but without a liquor licence, and also a post-office.

On the date alleged in the summons the three persons named came to the Balmoral Hotel, to await the arrival of the post-cart from George, and to ask Vedders to take a hand at whist.

On the arrival of the post-cart two passengers (Rev. Mr. Underwood and a Mr. Scott) alighted and entered the hotel. On entering they noticed that Ralph was under the influence of drink, and that Bibbey had also had something to drink. They further observed in the room, which used to be the bar when the hotel was a licensed house, a bottle containing an amber coloured liquor and some glasses standing on a table, a portion only of which they could see.

Bibbey and Bornemeza admitted that Mrs. Vedders had given them each a glass of sherry, and Ralph that she had given him a glass of lime juice, and that previously they had all had some liquor both at Bibbey's house and at an hotel at Millwood. The sherry was given by Mrs. Vedders in friendship without any consideration whatever.

Mrs. Vedders stated in her evidence that liquor was not usually kept in the house but that a bottle of sherry had been accidentally left on the previous Sunday by Mr. Ransby, of Knysna (this was corroborated by Ransby) and that it was this sherry which she gave to Bibbey and Bornemeza.

There was no evidence whatever of a sale of liquor, or indeed that liquor was kept in the house, nor was there anything to connect Vedders with the person who, it was alleged, had been supplied, except that he appeared to have been somewhere in the neighbourhood at the time.

None of the witnesses stated that he had had anything to do with the transaction.

The Magistrate found Vedders "guilty" and imposed a fine of £1. From this sentence the present appeal was brought.

Mr. Searle, Q.C., in support of the appeal: There was no evidence whatever of a sale,

[The Court intimated that it was not necessary to argue the case for the appellant.]

Mr. Giddy for the Crown: Although the evidence is not strong still there is a strong presumption that Ralph did obtain liquor on the premises, and on these grounds the Crown is justified in appearing to support the conviction.

The appeal was allowed and the sentence quashed.

The Chief Justice said: I do not think the prosecutor is at all to blame for instituting this prosecution, because there are suspicious circumstances in the case. When the Rev. Mr. Underwood came to the appellant's house he saw the men in the room, which was formerly used as a bar, and there was an amber-coloured liquor on the table, which, however, some of the witnesses said was lime juice, and Mr. Underwood also found that one of the men there was somewhat under the influence of liquor. Well, these are certainly suspicious circumstances, but the witnesses called for the prosecution—those who knew anything about the matter—are agreed that not a drop of liquor was sold there that day. They say the bottle contained lime juice, and that the man Ralph got drunk at Bibbey's before he came to the place. Under these circumstances I do not think the Court would be justified in upholding the conviction. The mere fact that a man was found drunk at the place is not enough to justify the conviction. Two of the men had a glass of sherry, but that was fully explained; a bottle containing some sherry was left in this place by a Mr. Ransby, and out of this bottle a glass of sherry was given. That is the evidence for the prosecution. At the same time, I think that the appellant had better give up the bar altogether. He has ceased to have a hotel, and he might as well cease to have a bar, because if the same suspicious circumstances occur again he may be convicted, and the conviction may be sustained. But on the present evidence it seems to me only a case of suspicion; without a tittle of evidence of sale, and therefore I think that the conviction must be quashed.

Their lordships concurred.

[Appellant's Attorneys, Messrs. Scanlen & Syfret.]

REGINA V. KEYTER. { 1895.
May 2nd.

Culpable insolvency—Punishment.

A punishment of six months' imprisonment with hard labour may be passed in respect of each of the offences enumerated in the 71st section of the Insolvent Ordinance.

This was an argument on a point reserved at the trial of the prisoner at the Circuit Court recently held at the Paarl.

The accused was indicted amongst other offences with the crime of culpable insolvency.

There were three indictments against the prisoner. In the first indictment three charges of culpable insolvency were preferred against the prisoner, and he was found guilty on each. On the third indictment the prisoner pleaded guilty to culpable insolvency.

The prisoner was sentenced to five months' imprisonment with hard labour on each count of the indictment on which he was found guilty, and to three months in respect of the count to which he pleaded guilty, or to eighteen months in all.

It was contended at the trial that under the 71st section of the Insolvent Ordinance the prisoner could only be sentenced to a maximum punishment of six months. The learned judge (Mr. Justice Buchanan) who presided at the trial expressed the opinion that six months' imprisonment could be passed for each contravention of the 71st section, but he reserved for argument before the Supreme Court the question as to the legality of the sentence passed by him on the prisoner.

Mr. Molteno for the prisoner: It is submitted that the maximum punishment that can be passed on a person found guilty of culpable insolvency is six months' imprisonment with hard labour. The prisoner was guilty of only one crime—culpable insolvency. There was only one insolvency and the maximum statutory punishment cannot be exceeded. Section 72 of the Ordinance confers a new jurisdiction on magistrates, and shows that it was clearly the intention of the Legislature that the punishment for culpable insolvency should be limited to six months. All or any of the acts enumerated in the 71st section shall constitute culpable insolvency, but if an insolvent is found guilty of having committed any two or more of such acts he cannot be sentenced to a greater punishment than the Ordinance provides. Where there is a doubt statutory offences must receive a liberal interpretation. *Maxwell*, p. 345. As to the intention of the Legislature that six months should be the maximum punishment, see *Hon. Wm. Porter's Speeches*, p. 257.

The sentence should be reduced to six months.

Mr. Giddy for the Crown.

The point reserved was decided against the prisoner.

The Chief Justice said: The 71st section of the Ordinance creates nine specific and distinct offences under the generic term of culpable in-

solveny; and on each offence, in my opinion, the insolvent can be prosecuted, and if found guilty, sentenced to the punishment which is provided by the section. If any doubt were left upon the question, that doubt is removed by the terms of the 72nd and 73rd sections. The 72nd section provides that "it shall be lawful for the Courts of Resident Magistrates in this colony, on the conviction of any of the offences set forth in the last preceding section, to sentence such person to the punishment in the said section provided." If Mr. Molteno's reading were correct this section would have read, "on the conviction of any person of the offence mentioned in the last section." It is clear, therefore, that under the 72nd section the Magistrate would have jurisdiction, if the different offences were specific and separate, to sentence the insolvent to each of the terms of imprisonment provided by the 71st section. The 73rd section is in the same terms in regard to any of the offences set forth in the 71st section of the Ordinance, and it seems only reasonable that it should be so, because one can hardly imagine that the Legislature intended that a man who commits every one of the offences mentioned in the 71st section should be as lightly treated as one who committed only one offence. One man might not have kept books, and he would be liable to the same punishment as a man who had not only not kept books, but who had committed all the other offences specified in the 71st section. Well, then, that being so, I think the whole argument for the prisoner falls to the ground. No doubt there are in this case three specific counts for breach of trust, but really it was a separate breach of trust committed at different times and in respect of different persons, and this case is met by the 63rd rule of Court. For these reasons the question reserved for the opinion of the Court must be decided against the prisoner.

Mr. Justice Buchanan: This was the opinion I expressed at the trial, and I am glad to hear that the Court agrees with me.

Mr. Justice Upington concurred.

[Prisoner's Attorney, S. J. Mostert.]

FRIBERG V. DE JAGER. { 1895.
May 2nd.

Interpleader suit—Pledge—Goods attached declared executable.

Where goods, which had been attached by a judgment creditor, were alleged to have been sold to one De J. by the judgment

debtor, although in terms of the alleged contract of sale, they were to remain in the possession of the judgment debtor, and were actually in his possession when they were attached.

The Court, reversing a Magistrate's decision, held that the transaction between the judgment debtor and De J. was not a bona-fide sale, that it was a mere pledge, and that as the goods remained in the possession of the judgment debtor, they were liable to execution.

This was an appeal from a decision of the Resident Magistrate of Riversdale, sitting at the Periodical Court at Heidelberg, in an interpleader suit in which both the appellant and the respondent were summoned to have it determined whether certain movable property (attached on the 23rd January, 1895, by the messenger by virtue of a writ of execution issued at the instance of Friberg against the movable property of one Casper Bester, in satisfaction of a judgment obtained against him), and claimed by De Jager as his property, was liable to execution.

The articles attached were claimed by De Jager by virtue of a written contract of sale executed by Bester.

The evidence went to show that De Jager and Bester, who are brothers-in-law, live in the same house. According to De Jager the articles attached (11 ostriches, 60 sheep, 3 head of cattle, 1 mare and 1 saddle) were bought or taken over by him from Bester for a debt of £34.

Bester was summoned in three cases, and De Jager paid £15 10s. on his account and became liable for another £8. Bester also owing De Jager £10 for cash lent.

The movables were in Bester's possession when they were attached.

The Magistrate found that the transaction between De Jager and Bester was *bona fide*, and declared the property not executable.

From this judgment Friberg now appealed.

Mr. Juta, Q.C., was heard in support of the appeal.

Mr. Joubert for the respondent.

The appeal was allowed.

The Chief Justice said: The Court has more than once decided that a contract which purports to be a contract of sale is not necessarily a sale, if it is clear from the surrounding circumstances that the transaction was intended to operate only as a pledge. Now in the present case there was no contract of sale drawn up at all. The only contract put in is one in which

Bester acknowledges to have received certain articles from De Jager, and he promises that he will take care of them, and that he will not have the right to sell or exchange them without the consent of De Jager. Now if the parties really believed that these goods belonged to De Jager, it would have been wholly unnecessary for them to have made such an arrangement, because necessarily it would follow that if the goods belonged to De Jager, Bester, who had the custody of them, would not be entitled to sell them. In this case it strikes me as very strange that James Helm, who drew up this document, was not called as a witness. I see he is also the agent who received the warrant to defend the case in the Magistrate's Court. The handwriting is exactly the same and the paper is exactly similar. The evidence appears to be that no receipts were produced for these payments; it is only the attorney's evidence; that Bester and De Jager came to his office, and De Jager undertook to pay the costs of three summonses, amounting to £15 10s; that De Jager paid off part and he looked to him for the balance, Bester being relieved from liability. Now, in my opinion, the transaction was this: De Jager may have lent money or paid money for Bester in order to secure to himself these goods; a contract purporting to be a sale was drawn up, but it was really intended to operate as a pledge, and inasmuch as these goods were afterwards kept by Bester and were not in the custody of De Jager, the pledge ceased and the goods ought, in my opinion, to have been declared executable by the Magistrate. The appeal must be allowed with costs.

[Appellant's Attorney, G. Montgomery-Walker; Respondent's Attorneys, Messrs. Reitz & Herold.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS (Chief Justice),
Mr. Justice BUCHANAN, and Mr. Justice
UPINGTON.]

RUDD V. RUDD.

1895.
} May 3rd.

This was an action for divorce brought against Edward Augustus Rudd, of Oudtshoorn, by his wife for a decree of divorce on the ground of his adultery.

Mr. Molteno appeared for the plaintiff.
The defendant in person.

Mr. Norman Lacy produced the marriage register.

The defendant admitted the marriage.

Mrs. Jacomina Josina Rudd, of Oudtshoorn, the plaintiff, said she was married to defendant in 1881. There had been eight children, six of whom were still alive, all minors. At the latter end of 1894, her husband was often away from Oudtshoorn. He first went to Cape Town in July, and returned in a short time; then left again, and remained till about the end of September. He was also away in November and January. They were married in community of property. She brought into community £600 and a life-interest, with certain property inherited from her father. Defendant was now an insolvent. Plaintiff (continuing) said she intended to make a living by taking in boarders. Her mother was going to help her by building a house for her at Oudtshoorn. She wished for the custody of the children.

Cross-examined: Last year defendant was not very kind to her children. He had had to ask for her forgiveness. He had acted unkindly to her mother, and he said he did love the children except the eldest. He had never beaten or ill-treated the children. She did not think by bringing that action she had acted hastily. Why had he spent money so lavishly? She would have sued for a divorce after hearing of his actions, whether her mother had spoken to her or not.

Edward Foley said he kept a boarding-house in Loop-street. About October, 1894, defendant came to his house with a woman he knew, named Mrs. Polly Farrance. She had been a servant at Claridge's Hotel. Defendant came and said the woman was his nurse, and had to attend him as he was ill. He hired a room in which was one bed. He said he was unable to sleep at nights and the woman had to look after him. He had no suspicions at first, but one morning about 8.30 he happened accidentally to go into the room and saw them lying in bed together. He turned defendant out of the house at once. The woman had no money and nowhere to go, and she was retained as a servant. She was now in the Free State. The next time he saw Rudd was late one night when, from what he had heard from a servant, he went to the room of a woman, Miss Dick, who had just come from England, and found Rudd lying on one of the beds in the room. The woman had lodged at his house a week. She did no work—only drank. When he got to the room he found the door locked, and when he knocked the light was blown out. He asked the woman if anyone was in the room with her. She

replied, "No." He demanded admission. She said she was undressed and in bed. He said she must dress and admit him. He waited ten or fifteen minutes, and was then allowed into the room, and found Rudd lying dressed on a bed.

Cross-examined: He denied having used any inducements to get defendant to come and live at his house with either of the women. Defendant had admitted adultery to him with Mrs. Farrance. He said he was not guilty with respect to Miss Dick.

Walter Osmond Hanson corroborated the last witness with respect to seeing defendant in Miss Dick's room lying on one of the beds. The date was a little after Christmas.

Defendant expressed himself desirous of giving evidence, but the Chief Justice said he could scarcely advise him to do so, and defendant withdrew his request and simply asked that he might at all reasonable times be allowed to see his children, of whom he said he was very fond.

The Chief Justice said. "Sufficient proof of adultery has been given. A decree of divorce with costs is granted, plaintiff to have the custody of the children, defendant to have access to them at all reasonable times and places.

[Plaintiffs' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

MATTHYS V. HENNING. { 1895.
May 3rd.

Missionary Institution—Rules and Regulations—Magistrate's jurisdiction—Ejection—Act 20 of 1856 section 10.

The rules of a Missionary Institution, which had been approved of by the Governor, provided in effect that a resident should forfeit his temporal rights at the suit of any of the missionaries, should it be proved to the satisfaction of the Magistrate of the district, that after reasonable warning, he persisted in disregarding the temporal regulations of the institution, and that his conduct and example tended to demoralise the inhabitants.

Charges of intemperance and immorality having been proved against M., an inmate of the institution, in an action for ejection brought against him by the resident missionary in the Magistrate's Court, judgment was given in favour of the plaintiff.

M.'s right of occupation was of the value of £40.

Held, on appeal, reversing the judgment of the Court below, that the Magistrate had no jurisdiction.

This was an appeal from a decision of the Resident Magistrate of Caledon in an action for ejectment brought against the present appellant, defendant in the Court below, by the respondent, plaintiff (the Rev. Paul Henning, superintendent of the Moravian Missionary Institute at Genadendal).

The summons alleged :

1. That heretofore, to wit, on or about the 15th day of February, 1858, the then Governor of the Colony of the Cape of Good Hope, on behalf and in the name of Her Majesty Queen Victoria, granted unto the plaintiff's predecessor in office (the Rev. Kolbing) a certain piece of perpetual quitrent land, whereon is situate the Missionary Institute of Genadendal, for the use and in trust for such persons as may from time to time be lawfully resident at the said institution, and further subject to the regulations of the said institution revised, added to, and approved by the Government of the said colony in the year 1857.

2. That the defendant, prior to the year 1889, became a lawful resident of the said institute at Berea, adjoining and being part of the said institute, and as such lawful resident became possessed of a certain house and garden premises at Berea subject to the said regulations, and the said defendant is still in possession of the said garden and premises and refuses to quit same, although frequently requested so to do by the proper authority at Genadendal aforesaid, owing to the fact that the defendant did, through and by reason of his wrongful, unlawful, and immoral conduct during the period reckoned from the beginning of the year 1889 up to the date hereof, legally forfeit his temporal rights in and did cease to be such lawful resident of the said institution, inasmuch as he did, *inter alia*, specially violate and contravene regulation No. 6, chapter 4 of the said regulations, and generally all and every the regulations relating to the good conduct and behaviour of the residents of the said institution, in that he was on or about the 17th day of August, 1889, excluded from the the sacred or church privileges of the said institution, and is still so excluded by reason of his adultery with one Matilda Arense, committed within the precincts of the said institution, and further, by reason of his having been convicted on various and divers subsequent

occasions before the said Court of the crimes of drunkenness, rowdiness, and using bad language, more particularly during April, 1894, on the 23rd August, and on 16th October, 1894.

Wherefore by reason of the defendant's aforesaid conduct, and generally by reason of his immoral and improper example, since the year 1889 up to the date hereof, which said conduct and example have tended and still tend to demoralise the inhabitants of the said institution, and generally on account of the facts hereinbefore alleged, the plaintiff in his aforesaid capacity doth pray :

(a) That the said defendant may be condemned to deliver up to the said plaintiff possession of the piece of ground and premises aforesaid, and that, if need be, the said plaintiff may be put into possession by the proper officer of this Court, and that the said defendant may be ejected from the said premises, and interdicted from entering upon or disturbing the same.

(b) That the defendant may be adjudged to have forfeited all and sundry his other temporal rights as a resident of the said institution.

(c) Costs of suit.

The defendant took several exceptions to the summons, the most material of which were the following :

2. That plaintiff having no title to the property in dispute has no right to sue (Act 20 of 1856, section 10).

Exception overruled.

3. That future rights being in dispute the case is beyond the Magistrate's jurisdiction.

Exception overruled.

4. That the property of the defendant being of the value of over £40, the case is beyond the Magistrate's jurisdiction.

This exception was also overruled on the grounds that the property was under the value of £40.

The defendant in his plea denied (1) the allegation of adultery and (2) that during his long term of residence, viz, forty-eight years, his conduct had been such as would tend to demoralise the inhabitants of Genadendal ; further, he denied that he was convicted before the Court on the 23rd August, 1894, as alleged in the summons, and he finally pleaded the general issue.

Rule 6, Chapter 4, of the Regulations, is as follows :

A resident may be excluded from church privileges without thereby forfeiting his temporal rights as a resident, but he shall forfeit all such last-mentioned rights at the suit of any of the missionaries or overseers, should it be proved, to the satisfaction of the magistrate of the district, that after reasonable

warning, he persists in disregarding the temporal regulations of the institution, and that his conduct and example tend to demoralise the inhabitants.

The charges of intemperance and immorality were established, but as to the value of the defendant's house and premises there was considerable difference of opinion between the plaintiff's and the defendant's witnesses. According to the former, the value was not more than £30, and according to the latter the value of the premises was at least £50.

In estimating the value of the premises the Magistrate did not take into consideration the grazing rights held by the defendant as a resident of the institution, and which entitled him to graze 300 sheep and twenty-four head of cattle.

The Magistrate relying, as he stated in his reasons, on *Bechler v. Van Riet* (5 Searle, 203), gave judgment in favour of the plaintiff with costs.

From this judgment the defendant now appealed.

Mr. Searle, Q.C., in support of the appeal. The Magistrate had no power to make the wide order which he made. He could not grant an interdict nor could he declare a forfeiture. Rights in future were clearly involved and the Magistrate had no jurisdiction. See Act 20 of 1856, section 8 subsection 3. As to ejectment, see section 10. The regulations of the institution cannot confer a jurisdiction on the Magistrate which he does not possess under the Act. The Magistrate's attention could not have been directed to *Wildschut v. Kolbing* (3 Searle, 218).

Mr. Rose-Innes, Q.C., for the respondents.

The appeal was allowed with costs.

The Chief Justice said: There is much to be said in favour of the view that magistrates should have jurisdiction in cases arising in these missionary institutions. But a great deal may also be said on the other side. Here is a case of a man born and bred in this institution, he has lived there for over forty-eight years, he has built his own house, made his own garden, and brought up his family all in this place. Now he is to be turned out of house and home and deprived of the privileges which he possessed by order of the Resident Magistrate of the district. It was never intended to confer such large and extensive powers upon Resident Magistrates. The summons claims not only a decree of ejectment, but that the defendant be interdicted from entering upon or disturbing such premises, and be adjudged to have forfeited all his temporal rights as a resident of the institution. The Magistrate erred in granting the interdict, it is

admitted, and also in adjudging the defendant to have forfeited all his temporal rights. The only question therefore is whether he was right in ordering his ejectment as well. Under the Magistrate's Court Act magistrates have jurisdiction in cases of ejectment, but there is a distinct proviso in the 10th section that it shall not be shown by the defendant that the right to the occupation . . . is to him of the clear value of £40 sterling or upwards. In this case the defendant has proved that the occupation is to him of the clear value of £40. The plaintiff's witnesses admit that they have taken the buildings and garden to be worth £30, but they did not take into consideration the value of the grazing rights. Now, surely £10 would not be an unfair estimate to place on these rights. At any rate, £10 would not be far under the value to the defendant of the grazing rights admitted to be attached to his holding, and if that amount is added to the valuation even of the plaintiff's witnesses, there is no doubt as to the value being far above £40. If we take the estimate of the defendant's witnesses, that amount is far exceeded. That being so, under the 10th section of the Act, the Magistrate had no jurisdiction, and ought to have upheld the exception. I regret in one respect that a missionary institution and a missionary like the plaintiff should be obliged to come to the Supreme Court instead of by some cheaper process obtaining a judgment in the Magistrate's Court. At the same time we cannot extend the Magistrate's jurisdiction, and as he had no jurisdiction in this case, the appeal must be allowed with costs.

Mr. Justice Buchanan: I concur on the ground of want of jurisdiction in the Magistrate. At the same time, I hold that every person who joins and takes the benefits of these institutions must abide by the rules.

Mr. Justice Upington concurred.

[Appellants' Attorney, Paul De Villiers; Respondent's Attorney, G. Montgomery-Walker.]

DE VILLIERS V. WOLHUTER.

Mr. Molteno moved for an interdict restraining the defendant from removing her furniture from certain premises let to her by the applicant, pending an action for the recovery of rent due.

The Court granted the application, with leave to telegraph the order.

VAN NOORDEN V. VAN ZYL. { 1895.
May 8th.
Misjoinder—Exception—Summons—Declaration—Variance.

The defendants excepted to a declaration as being bad in law and embarrassing, on the

ground that it is a misjoinder to join a cause of action against the two defendants as executors and individually and a second cause of action against one defendant individually in the same declaration.

In fact, however, the declaration contained one count on a promissory note against the two defendants individually and a second count on a mortgage bond against the second defendant individually. although the first count in the summons was against both defendants as executors as well as individually.

Held, that the exception to the declaration could not be sustained.

This was an argument on an exception taken to the plaintiff's declaration.

The action is instituted by Mr. Emile H. van Noorden against Susannah Elizabeth and Pieter Marthinus van Zyl.

The declaration alleged that on the 28th day of August, 1890, the defendants for value received made in favour of the plaintiff or order a promissory note for £124 5s. 6d. in the following terms. (Terms of note set out.)

That the plaintiff is the legal holder of the said note, which became due and payable on the 28th December, 1890, and is still unpaid, notwithstanding lawful demand, and the defendants are jointly and severally indebted to the plaintiff in the sum of £124 5s. 6d., with interest thereon from the 29th December, 1890.

That the second-named defendant is further indebted to the plaintiff in the sum of £85 18s. 10d., being the amount of a certain mortgage bond passed on 5th June, 1891, by the said defendant in favour of the plaintiff, and which has become due and payable by reason of non-payment of interest. The capital sum of £85 18s. 10d. being due after lawful demand, together with interest at the rate of 6 per cent. reckoned from 5th June, 1891.

The plaintiff claimed judgment:

(a) Against the defendants jointly and severally for the sum of £124 5s. 6d., with interest from 29th December, 1890.

(b) Against the second-named defendant for the sum of £85 18s. 10d., with interest at 6 per cent from 5th June, 1891.

(c) Further relief with costs.

The summons, after claiming the sum of £124 5s. 6d. from both defendants, proceeded:

Or otherwise from both defendants, either in their individual capacity, or alternatively, in

their capacity as executors, the said sum of £124 5s. 6d., with interest, being balance of an account.

Before pleading to the declaration, the defendants excepted thereto as being bad in law and embarrassing, on the ground that it is a misjoinder to join a cause of action against the two defendants as executors and individually, and a separate cause of action against one defendant individually in the same declaration.

For a special answer to this exception the plaintiff said as follows:

Whereas it is true that in the summons in this suit the defendants are cited either individually or in their capacity as executors testamentary of the estate of the late Gideon van Zyl, yet in the declaration the plaintiff has not persevered nor does he persevere in his action against the defendants as such executors, but withdraws his suit against the defendants in that capacity, persevering and maintaining his said suit against the defendants in their individual capacity only.

Mr. Rose-Innes, Q.C., for the defendants, was heard in support of the exception.

Mr. Juta, Q.C., for the plaintiff.

The exception was disallowed with costs.

The Chief Justice said: As a matter of form, it would have been better that there should be two separate actions, one being against both defendants on the first count and the other against the second defendant on the second count. The Court could then, on the application of either plaintiff or defendants, have consolidated the actions into one. The summons is certainly irregular in suing the two defendants on the first count in a different capacity from that in which the second defendant is sued on the second count, but this irregularity does not occur in the declaration and no exception is taken on the ground of variance. The exception taken is really to the summons and not to the declaration. But the defendants' counsel has argued that this exception is wide enough to cover the further objection that the defendants, although sued individually, ought to have been declared against separately in respect of the two counts. In my opinion this objection is not properly raised by the exception. The course adopted by the plaintiff certainly tends to the saving of costs, and as it does not prejudice the defendants in any way, the Court is not prepared to sustain the objection, which is purely technical, unless properly raised by exception. The present exception must be disallowed with costs.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendants' Attorney, G. Montgomery-Walker.]

Ex parte MAXWELL AND HARP. Re NEEDT'S ESTATE.

On the application of Mr. Olose, Mr. E. R. Syfret was appointed provisional trustee, with power to carry on the business pending the election of a trustee.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS K.C.M.G., (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

Ex parte EVANS. { 1895.
May 9th.

On the motion of Mr. Innes, Mr. Morgan Owen Evans was admitted to practise as an advocate.

PROVISIONAL ROLL.

WILSON V. JAFTA.

Mr. Tredgold moved on behalf of the plaintiff for discharge of the provisional order.

Granted.

HOLLINGHURST V. FRAME AND CO.

Mr. Tredgold moved for judgment for £60 on a bill of exchange in terms of consent.

Judgment as prayed.

ZIEDERBERG AND DUNCAN V. KLAAS AND HELLIG.

On the motion of Mr. Close, the final order of sequestration was decreed.

SMITH V BLACK'S EXECUTORS.

Mr. Rose-Innes, Q.C., moved for judgment in terms of consent.

Judgment as prayed.

MCLEOD V. MEYERS.

Mr. Close moved for judgment, under rule 329 (d), for £20 11s. 4d.

Judgment granted, but without costs, there being no prayer in summons for costs.

GRAND PARADE BUILDINGS COMPANY V. NANNUCCI.

Mr. Maskew moved for judgment for £375, rent, and £9 2s. 6d., expenses of lease.

Judgment granted in terms of summons.

REHABILITATION.

On motion from the bar, the rehabilitation was granted of Johannes Hendrik Russouw and Carl Hermann Poppe, surviving partners of Poppe, Russouw & Co.

COLEMAN V. GERDS TUTORS. { 1895.
In re GERDS. { May 9th.

Tutors—Misconduct—Removal—Alienation of land—Jurisdiction of Eastern Districts Court—Ordinance 105, section 24.

In an application for removal of the tutors of a minor from their office on the ground that they had sold a farm belonging to him for less than its fair price, and had failed, within a reasonable time, to pay the purchase price received by them to the Master of the Supreme Court,

Held, that inasmuch as they obtained the authority to sell from the Eastern Districts Court in the belief that such Court had jurisdiction and were afterwards directed by a Judge of that Court to let the order remain in abeyance, pending further inquiry, they were not guilty of such misconduct as would justify their removal.

The Eastern Districts Court, as such, has no jurisdiction to authorise the sale of a minor's land not situated within the Eastern Districts

Quære, whether a Judge of that Court has such jurisdiction under the 24th section of Ordinance No. 105.

This was an application by Mrs. Wilhelmina Dorothea Coleman (born Gerds), the minor's aunt.

On 7th June, 1893, the respondents were appointed tutors dative of the minor under letters of confirmation of that date.

The assets belonging to the minor comprised *inter alia* a certain farm called Elands Poort, situate in the division of Willowmore. On 3rd October, 1894, the tutors dative upon petition to the Eastern Districts Court obtained an order confirming a provisional sale of the said farm to one Hayward for the sum of £1,300.

The petitioner alleged that she had been informed that the sum of £1,300 was far below the real value of the farm, which, if put up to public auction, would have realised £2,000. That the tutors dative had filed no account of moneys received on account of the minor, who had only received the sum of £30 from them for his support since 7th June, 1893.

That she considered the sale as not being to the advantage or interest of the minor, and that, if the tutors had done their duty and sold the farm by public auction, the minor would have benefited by such sale, and that, moreover, one Jurie van Veuren, the lessee of the farm, was prepared to pay £1,600 for it.

That the tutors dative were not fit and proper persons to represent the minor.

That the petitioner had been informed that the tutors dative have long since received the sum of £1,300, and that they have not paid the same into the hands of the Master, in terms of the order of the Eastern Districts Court, and that Hayward is taking steps to compel the tutors dative to effect transfer to him of the farm.

The prayer was for an order :

(a) Appointing a *curator ad litem* in an action to be instituted on the minor's behalf to set aside the sale, and to intervene in the action by Hayward against the tutors.

(b) Removing the tutors dative from their office as such, and for the appointment of some fit and proper persons in their place and stead to the management of the minor's property.

When the respondents applied to the Eastern Districts Court for confirmation of the sale the Court referred the matter for report to the Registrar of that Court, who reported *inter alia*, as follows :

"I consider that it will be for the benefit of the minor if the Court were to confirm the sale as proposed; however, with a view to protecting the minor's interests that the order be granted to the effect that. . . . The Registrar of Deeds be authorized to permit the transfer of the property aforesaid to William I. Hayward or to any other purchaser on production to him of proof that the sum of at least £1,300 has been paid in respect of the purchase amount into the hands of the Master of the Supreme Court as administering the Guardian's Fund."

"The said Master of the Supreme Court to be authorised whenever he may consider it to be for the benefit of the minor to cause the said sum of £1,300 (or more) to be withdrawn from the Guardian's Fund for investment in first mortgage bonds, to be approved of by him, and under such guarantees as to the said Master may seem proper'."

Upon the receipt of this report the Eastern Districts Court ordered as follows:

"That leave be granted to the applicants to sell the property upon the conditions stated in the petition (to wit, that the purchase amount of £1,300 be payable in cash and that the purchaser pay the costs of this application), and that transfer be made and the purchase amount

paid into the hands of the Master of the Supreme Court upon the conditions and in terms of the Registrar's report."

Mr. Searle, Q.C., for the applicant.

Mr. Graham for the respondents.

Mr. Rose-Innes, Q.C., held a watching brief for Hayward.

The Chief Justice said: It is impossible at this stage to give a final decision upon the question of jurisdiction which has been raised. The Eastern Districts Court, as such, had no jurisdiction in respect of the minor's land situated in Willowmore, which is not within the Eastern Districts at all, but it has been urged on the respondents' behalf that Mr. Justice Maasdorp had jurisdiction, as Judge of the Supreme Court, to authorise, by his order, the sale of the minor's land by his tutors (the respondents) to Hayward. The 24th section of Ordinance 105 prohibits the alienation of any minor's immovable property "unless the Supreme Court or any Judge thereof have authorised such alienation." In practice applications for such authority are generally made to the Supreme Court, but when they are made by a Judge specially assigned to that Court he issues his order through the Registrar of the Supreme Court in the same way as other orders made by a Judge in Chambers in Cape Town are issued. It would certainly be a strange anomaly if a Judge assigned to the Eastern Districts Court had larger powers than that Court itself, and could, as has been done in the present case, make an order authorising the sale of a minor's land not situated within the Eastern Districts and giving directions to the Registrar of Deeds and the Master of the Supreme Court in regard to the transfer of such land and the disposal of the proceeds of the sale. This question can be more fully considered in the action which has been brought by the purchaser (Hayward) against the tutors. On behalf of the minor an application is now made for the appointment of a *curator ad litem*, to intervene as defendant in such action for the purpose of raising the question of the invalidity of the sale on the ground of want of jurisdiction in the Judge who made the order and the inadequacy of the price paid. The application will be granted and Mr. Searle appointed *curator ad litem*. In regard to the further application that the tutors be removed from their trust there is not sufficient evidence to justify the Court in ordering such removal. Even if the price was inadequate it should be borne in mind that the authority of the Eastern Districts Court was obtained in the belief that that Court possessed the requisite jurisdiction. The delay in paying

the sum received by them as the price of the land into the hands of the Master of the Supreme Court is explained by the direction which the attorney received from the Judge-President to let the matter remain in abeyance pending further inquiry. The respondents must, however, be ordered to pay the money within ten days to the Master. The question of costs can stand over until after the trial.

[Applicant's Attorney, Gus. Trollip; Respondents' Attorney, C. C. Silberbauer; Hayward's Attorneys, Messrs. Scanlen & Syfret.]

IN THE ESTATE OF ELIZABETH RODGER.

Mr. McLachlan moved for authority to the executors to raise a sum of money on second mortgage of the landed property of the estate, situated at Green Point, for the purpose of settling pressing claims.

The value of the property was said to be £3,500, and the second mortgage was proposed to be £517.

Order granted.

SHARP V. SHARP.

Mr. Buchanan moved for the attachment *ad fundandam jurisdictionem* of certain land and premises known as No. 3, Church-square, Cape Town, in an action about to be instituted by edictal citation against Herbert Sharp for the recovery of the amount of a mortgage bond. The amount of the bond was £2,100. Sharp was in London, and had paid neither principal nor interest.

Order granted.

O'SHEA V. PORT ELIZABETH MUNICIPALITY.

On the motion of Mr. Searle, Q.C., Mr. Molteno was appointed commissioner to take the evidence of one Thomas Reeve, a witness for the defendants.

MORGENROOD V. MORGENROOD.

Mr. Currey moved that the rule *nisi* should be made absolute admitting applicant to sue *in forma pauperis* in an action for divorce.

Rule made absolute.

Re ALIWAL NORTH BOARD OF EXECUTORS, IN LIQUIDATION.

Mr. Molteno moved for confirmation of the second report of the liquidators.

Report confirmed.

Re DE MEILLON, AN ALLEGED LUNATIC.

Mr. Joubert moved for the appointment of a curator to take charge of the property of the

alleged lunatic, with power to sell the same by public auction, and to pass transfer of the landed property to the purchaser thereof.

The Court granted the order, and appointed Mr. Proudfoot curator with the powers asked for, full accounts to be rendered and the balance paid to the Master.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.O.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

SIMONS V. SIMONS. { 1895.
May 10th.
„ 11th.

This was an application by Mrs. Simons, of the Commercial Hotel, Grave-street, for an interdict restraining her husband from parting with, pledging, selling, or otherwise dealing with the Commercial Hotel or the furniture or stock, pending the determination of an action brought by her for a judicial separation on the grounds of the respondent's cruelty and ill-treatment. The petitioner also prayed for the sum of £50 to enable her to meet the costs and expenses of the action.

The petitioner, who is married in community, alleged that she had reason to believe that her husband was endeavouring to make away with all his property, including the hotel, of which the petitioner is the manageress, and that her reason for this belief was that last night, between five and six o'clock, a man named Naylor came into the hotel and showed the petitioner a document which he stated had been given to him by her husband (the respondent), appointing him sole manager of the business, and that Naylor caused all the money to be taken from the till on the grounds of his alleged position as manager. Under the circumstances she asked for an interdict.

Mr. Sheil appeared for the applicant.

Mr. Benjamin for the respondent.

Before the arguments had been concluded it was announced in court that the respondent had just committed suicide.

The Chief Justice said: If the report be true that the respondent has committed suicide, of course no order can be made under these circumstances.

Mr. Sheil: I would ask that the matter may be mentioned this afternoon in chambers before one of the judges if the report should prove to be unfounded.

The Chief Justice: Certainly that can be done.

* * * * *

On the following day (May 11) the application was renewed. The report of the respondent's suicide proved to be unfounded.

Before the application was entered upon Mr. Benjamin apologised for having imparted certain information to the Court on Friday, which, when subjected to investigation, turned out to be false.

The Chief Justice said: Those who gave the instructions ought to have made fuller inquiries. They had no right merely upon rumours to come into court and prevent the Court from making an order which probably otherwise would have been made. Mr. Benjamin was not to blame, having stated what he was told to state.

Mr. Sheil put in an agreement in which respondent, on his wife agreeing to stay proceedings, promised not to ill-treat her or beat her. He acknowledged himself as guilty of having ill-treated her, and made over the full and sole management and control of the Commercial Hotel to her to have full powers over it as if it were her own property; and if he should lift up his hand against her in the future or ill-treat her or abuse her that agreement might be used in evidence against him.

Mr. Benjamin said that agreement was signed on the understanding that the action would be stayed, but it was proceeded with. An affidavit was filed in which the respondent stated that there had been considerable unpleasantness between him and his wife, and that there was cause for his conduct owing to the provocation which he had received. He alleged that he had not beaten his wife. She was of dissolute and drunken habits, illiterate, and not competent to keep books and accounts. When in liquor she had been imposed upon by people and robbed. She had assaulted him in the Standard Bar, Adderley-street, and often given him black eyes. He had left her in temporary charge of the hotel a few days ago, but no takings from the bar of the hotel had been deposited in the bank. Large accounts had to be met, and he feared his estate was in danger of being placed under sequestration. He denied having taken steps to sell the hotel. With reference to the application for £50, he said that applicant had been in possession of all moneys of the hotel for some time, and in addition, that she had robbed him of his watch and chain and diamond pin.

Mr. Sheil was heard in support of the application, and suggested that Mr. E. R. Syfret should be appointed by the Court to exercise a general supervision over the business, pending the result of the action.

The Chief Justice said: The Court will authorise the applicant to continue the management of the business under the supervision of Mr. E. R. Syfret, pending the result of the action, which must be brought during the present term, with leave to Mr. Syfret to deposit all moneys in some fit and proper bank, and to advance to the applicant such sums as she may from time to time require to meet the expenses of the action, such sums not to exceed £40 in all. The costs to be costs of the cause.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

SEALE V. SEALE. { 1895.
May 10th.

This was an action for divorce instituted by Mrs. Elizabeth Charlotte Seale against her husband Henry Francis Seale, a jeweller carrying on business in Church-street, Cape Town, on the grounds of his adultery with one Annie Bushby.

The declaration alleged that the parties were married in community of property before the R.M. of Cape Town on the 25th April, 1878, and that the marriage was still in full force and effect.

That there had been issue of the marriage six children, three of whom were still living.

That on divers occasions and at divers places between the years 1893 and 1895, but more particularly during the month of March, 1895 the defendant wrongfully and unlawfully committed adultery with one Annie Bushby and with divers other persons to the plaintiff unknown.

The plaintiff's prayer was for:

(a) A decree of divorce dissolving the marriage now subsisting between herself and the defendant.

(b) Custody of the surviving children of the marriage.

(c) Division of the joint estate.

(d) That the defendant might be ordered to pay the plaintiff the sum of £25 per month, or such other sum or sums per month as to the Court might seem meet for her maintenance and for the maintenance, support, and education of the surviving children of the marriage.

(e) Alternative relief and costs.

The defendant in his plea admitted the marriage and the charge of adultery so far as it related to Annie Bushby.

With regard to the division of the estate he said that a forced division would be detrimental to both parties, and with regard to the custody of the children he said that in consideration of the ages of the elder children (16 and 7) it would be more advantageous if the children were sent to school, and he said that he was ready and willing to submit to such judgment in the premises as to the Court might seem meet.

After the plea had been served a consent paper was signed in terms of which the plaintiff agreed to accept £700 as her share of the joint estate, she to keep the furniture. The eldest girl to remain at school where she now is and to be allowed to visit the plaintiff during her holidays.

The eldest son to be sent to a boarding school on the same terms, both children to be maintained by the defendant.

The youngest son (an invalid) to remain with his mother, but all medical expenses to be paid by the defendant.

The plaintiff and defendant to be at liberty at all reasonable times and places to have access to their respective children.

The defendant to pay the costs of the action.

Mr. Shell appeared for the plaintiff.

Mr. Juta, Q.C., for the defendant.

Mrs. Seale was called and gave formal evidence as to the date of the marriage and expressed her satisfaction as to the terms of the consent paper.

Private Detective Loader deposed that on the night of 12th March last he and Inspector Hart followed the defendant from his place of business to 3, Mount-street. That he afterwards went to a window of one of the rooms, struck a match, and found the defendant in bed with a woman who was not Mrs. Seale.

By the Court: He could not identify the woman but he was sure it was not Mrs. Seale.

The plaintiff was recalled, and swore that she had not slept at 3, Mount-street, on the night of 12th March.

The Court granted a decree of divorce and entered judgment in terms of the consent paper. Plaintiff to have the custody of the children.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorneys, Messrs. J. C. Berrange & Son.]

SUPREME COURT.

[Before Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

HUDSON, VREEDE AND CO. V. } 1895.
COOPER. } May 19th.

Mr. Watermeyer applied for the final adjudication of the defendant's estate.

Order granted.

LITHMAN V. HORN.

Mr. Graham applied for the final adjudication of the defendant's estate.

Order granted.

VISAGIE V. VISAGIE.

Mr. Molteno moved for provisional sentence on a promissory note for £898 11s. 10d., with interest at 6 per cent. from 18th December, 1894.

Granted.

LOOK V. KLUYT.

Mr. Searle, Q.C., applied for costs of suit in an action for transfer of certain land. Since the proceedings had been taken defendant had signed the necessary papers to effect transfer of the land but had not paid costs.

Granted.

REHABILITATIONS.

On motion from the bar, the following rehabilitations were granted: Josias Alexander de Kock, Frederick Osborne (release from sequestration).

BROOKFIELD V. BROOKFIELD.

Mr. Maskew moved for leave to petitioner to sue by edict in an action against his wife on the grounds of her alleged adultery.

Order granted. Personal service to be made; summons returnable on the last day of this term.

NAUDE V. FRY'S EXECUTRIX.

Mr. Olose applied for leave to sue by edictal citation in an action against the executrix testamentary of the estate of the late John Larkin Fry for the recovery of an amount due on a mortgage bond.

The Chief Justice said: You had better take an order in addition to attach the property

mortgaged *ad fundandam jurisdictionem*. Leave will be granted to sue the defendant by edictal citation, personal service if possible; if not, one publication in a Berlin daily newspaper. Date of return August 1.

VERMAAK'S EXECUTORS V. VERMAAK'S
EXECUTORS.

Mr. Innes, Q.C., moved for the appointment of a commission to take the evidence in Cape Town of Johannes A. Vermaak, one of the defendants, who is about to proceed to England under medical advice.

Granted. Mr. Jutta was appointed commissioner.

THE PETITION OF GEORGE F. RAUTENBACH.

Mr. Olose moved for the attachment *ad fundandam jurisdictionem* of this Court of certain portions of the farm Patentie and Geelhoutboom, situate in the district of Humansdorp, in an action about to be instituted by edictal citation against Ignatius S. Ferreira for transfer thereof.

Granted. Summons returnable June 12.

IN THE MATTER OF THE CAPE OF GOOD HOPE
BANK.

Mr. Innes, Q.C., moved for an order authorising two or more of the official liquidators to perform any act and sign any deed in connection with the liquidation of the said bank, and for leave of absence for three months to John Robertson Reid, one of the said liquidators, who is proceeding to England on private business.

Order granted.

JONES V. TOWN COUNCIL OF { 1895.
CAPE TOWN. { May 16th.

Appeal—Privy Council—Charter of Justice, section 50.

Leave given to appeal to the Privy Council where the petition had been lodged with the Registrar and notice given to the other side within fourteen days from the date of the judgment, but no application had been made to the Court within the fourteen days.

This was an application for leave to the defendants to appeal to the Privy Council from the judgment of the Court on an exception decided in the plaintiff's favour on the 6th February last.

The petition for leave to appeal was lodged with the Registrar, and notice given to the

other side within the fourteen days provided by section 50 of the Charter of Justice, but application to the Court was not made until to-day.

Mr. Searle, Q.C., and Mr. Graham for the applicants (defendants).

Mr. Rose-Innes, Q.C., and Mr. Jones for the respondent (plaintiff) opposed the present application as the petition for leave to appeal had not been presented to the Court, although it had been lodged with the Registrar, within the fourteen days provided for by the 50th section of the Charter of Justice.

The Chief Justice said: Although the objection raised in this application has never been previously formally taken, yet the Court sees no reason why the practice which has been adopted in this Court for a long period should be departed from. It has always been assumed if the petition was filed within fourteen days, and notice given to the opposite party of such filing, it was always open within three months after the filing of the petition to apply to the Court and give security. It is true that the 50th section of the Charter of Justice is somewhat obscure, but we feel that we ought to construe the provisions relating to appeal as liberally as possible in favour of the appellant. Leave to appeal should therefore be granted on the usual terms.

Mr. Justice Upington said: In all my experience I have understood that if the petition were lodged and notice given within fourteen days that was sufficient.

The Chief Justice said: Of course it must be understood that our decision in this case would not debar any person who has obtained judgment from applying to the Court at any time to put it into execution. That ought to be clearly understood. It might perhaps be understood from our judgment that a party obtaining judgment must wait for three months before applying for execution.

[Applicants' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Scanlen & Syfret.]

DEMBITZER V. JACOBSON.

Mr. Tredgold applied for an order restraining the respondent from receiving more than half the surplus of the proceeds of certain land, sold in execution in the case of Eilenberg v. Jacobson, on the ground that the applicant was a partner of the said respondent when the property was acquired, and that title was erroneously registered in the name of Jacobson instead of the firm; and for an order directing the Sheriff to pay half the said surplus to petitioner.

Order granted.

IN THE MATTER OF THE MINORS SUTTON.

Mr. Close moved for authority to the Master of the Supreme Court to pay out to the mother of the said minors an amount to their credit in the Guardians' Fund, to enable her to purchase a house, and so to assist in providing for their maintenance.

Order granted in terms of the Master's report.

O'SHEA V. TOWN COUNCIL OF PORT ELIZABETH. 1895.
May 13th.
" 17th.
" 20th.

Public body—Misfeasance - Negligence —
Damage—Municipal drain—Adoption of
private underground drain.

The Town Council of Port Elizabeth, having statutory power to make and keep in repair the drains within the limits of the Municipality, constructed a drain into which surface waters collected from a considerable area flowed, and from which such waters were discharged into a surface drain in a private road belonging to H., but within the limits of the Municipality.

H., substituted a defective underground drain for such surface drain and, with the consent of the Town Council, connected it with the upper Municipal drain.

An obstruction having occurred in the lower underground drain owing to the gradual accumulation of gravel and debris discharged into it from the Municipal drain, the water was forced back and, escaping through the interstices between the bricks (which had been laid without mortar), penetrated underneath the foundations of the plaintiff's stores, into his stores and damaged his goods.

In an action against the Town Council for damages.

Held, that the adoption as part of the Municipal drainage system of a defective drain was as much an act of misfeasance as if the Town Council had itself constructed the drain, that the discharge of water and gravel into such a drain without the precaution of from time to time inspecting and, if necessary, cleaning it was an act of negligence, and that the Town Council was liable for damages which might reasonably have been foreseen as likely to be caused by such negligence.

This was an action for damages instituted by Henry O'Shea, trading under the style or firm of O'Shea & Co., against the Mayor, Councillors, and ratepayers of Port Elizabeth.

The declaration was in the following terms :

1. The plaintiff is a wool-presser and produce merchant, carrying on business at Port Elizabeth under the style or firm of O'Shea & Co. The defendants are a public body, incorporated under the title aforesaid by the Act 14 of 1868, and will be referred to hereinafter as the Council.

2. By section 35 of Act 14 of 1868, it is provided that the Council shall have power and authority to make and keep in repair sewers and drains within the limits of the Port Elizabeth Municipality, and by section 23 of Act 8 of 1881 the duty is imposed upon the Council of seeing that due provision is made in every plan submitted to them by persons desirous of selling lands in sub-divisions within the municipal limits for the efficient drainage of such lands.

3. The plaintiff is the lawful occupier by lease from the Port Elizabeth Harbour Board of certain land and buildings situated at the corner of Harries and North Union-streets, and marked as "O'Shea's Stores" upon the plan annexed to this declaration. The said premises form portion of certain land registered in the name of the said "Harbour Board" and which has been sub-divided by the said Board with the consent of the Council into blocks. The said premises and the said land fall within the limits of the Port Elizabeth Municipality.

4. In former years an open drain ran down Harries-street for the purpose of carrying off surface water and other drainage flowing down and along Military-road and North Union-street, and so into Harries-street, as marked upon the said plan.

5. Thereafter, though the plaintiff is not able to give the exact date, the said Harbour Board, with the knowledge and consent of the said Council, filled up the said open drain and constructed an underground covered drain along the whole length of Harries-street. By agreement with the said Council the said drain was connected with a covered drain in North Union-street, constructed by the Council, and the said Council further caused the water in certain open drains or courses running down the Military-road to be conveyed into the North Union-street drain and thence into the drain along Harries-street, and thence to the sea.

6. It was and is the duty of the defendant Council to take all due and proper measures, and to construct all necessary drains, for the effectual drainage of the locality in question, and more especially to construct the said drains

and works hereinbefore specified, or to cause them to be constructed in a proper, workman-like, and efficient manner, so as to carry off the water flowing into them without detriment to the adjoining property, and further, to maintain them, or cause them to be maintained in a proper and efficient condition.

7. Due and proper measures were not taken by the defendant Council for the effectual drainage of the said locality, and the said drains and works were not constructed in a proper manner as aforesaid, but were negligently and unskillfully and improperly constructed, and were not maintained in a proper and serviceable condition.

8. On or about the 23rd November, 1894, the said drains became blocked, and large quantities of water escaped from the said drains, and flowed into the premises occupied by the plaintiff, as aforesaid, and damaged the said premises, and the goods contained in them. The said damage was caused by the negligent and improper conduct of the defendant Council in regard to the construction and maintenance of the drains and works aforesaid.

9. On the said date the plaintiff had on his premises certain wool, skins, and other produce belonging to himself, and also certain mohair, wool, and other produce belonging to third parties with whom he had contracted to press, sort, and ship the said wool, mohair, and other produce. The plaintiff submits that he, as being liable under the said contract to [the owners of the articles aforesaid for any damage resulting to them, is entitled to recover the amount of the said damage from the defendant Council.

10. The plaintiff caused the said produce to be removed and dried, and caused steps to be taken for its preservation, and he thereafter caused some of it to be sold after due survey. The defendant Council were informed from time to time of the action taken by the plaintiff as aforesaid.

11. The plaintiff annexes hereto a memorandum of account marked B, showing the particulars of the loss and damage caused as aforesaid to his own produce, and also a memorandum marked C, showing similar particulars in regard to the remaining articles.

12. The plaintiff has demanded from the defendant Council payment of the sums of £156 4s. 3d. and £990 16s. 7d., being the total damage as shown by the respective memoranda aforesaid, but the said Council refuses to pay any portion of the said accounts.

The plaintiff claims :

(a) Payment of the sums of £156 4s. 3d. and £990 16s. 7d. for damages as aforesaid.

(b) Further relief.

(c) Costs of suit.

The Council filed the following plea :

1. The defendants admit the first and second paragraphs of the declaration.

2. As to paragraph 3 of the declaration, the defendants deny that the land registered in the name of the Harbour Board has been subdivided by the said Board into blocks with the consent of the defendants. They say the subdivision of the said land into blocks was made prior to the promulgation of Act 8 of 1881, and that no plan of such subdivision was ever submitted to them by the said Harbour Board. The defendants admit the other allegations in the third paragraph.

3. The defendants deny the fourth paragraph of the declaration.

4. As to the fifth paragraph of the declaration, the defendants admit that the said Harbour Board constructed an underground covered drain along the whole length of Harries-street, and connected the said drain with the covered drain in North Union-street constructed by the Council. They further admit that all the water running down the drain in North Union-street would flow into the drain down Harries-street, and thence into the sea. Save as is herein admitted the defendants deny the fifth paragraph of the declaration.

5. The defendants further say that the said Harries-street is a private street made and maintained by the said Harbour Board, and situate on the aforesaid property registered in the name of the said Board, and no way under the control of the Council. They further say that the drain down Harries-street was made and has been maintained by the said Board, and that there is no duty cast on the Council to construct drains on the said property of the said Board for the effectual drainage of the said property, or to properly maintain any drains made on the said property of the said Board.

6. The defendants admit that on the 23rd November last water escaped from the said drain down Harries-street and flowed into the premises occupied by the said plaintiff. They say that the escape of the said water was not due in any way to the negligent construction or maintaining of any drains constructed or maintained by the Council. They say that by reason of the premises they are not liable for damage caused by the escape of water from the drains in Harries-street, and that if any damage has been sustained by the plaintiff by reason of the water escaping from the said drain in Harries-street through the negligent or improper construction or maintenance of the said drain, such damage should be claimed from the said Board and not from the defendants.

7. For a further plea should this Honourable Court hold that the defendants are responsible for the construction and maintenance of the drain in Harries-street, and that it was the duty of the defendants to construct all necessary drains for the effectual drainage of the property registered in the name of the said Board, the defendants say :

8. That all necessary drains for the effectual drainage of the said property were constructed ; that the said drains, including the one down Harries-street, were constructed in a proper and efficient manner, and were maintained in a proper and efficient condition.

9. The defendants further say that the escape of water referred to in the 8th paragraph of the declaration was not due to the negligent and improper conduct of the defendants in regard to the construction and maintenance of the said drains.

10. The defendants, save as hereinbefore admitted, deny the 6th, 7th, and 8th paragraphs of the declaration.

11. The defendants further say that there was negligence on the part of the plaintiff in the storing of the said wool, mohair, and other produce, and in the construction of the premises in which the said wool, mohair, and other produce were stored, which were wholly unsuitable for the storage of such articles. The defendants say that by such negligence the plaintiff contributed to, and was the cause of, the damage complained of.

12. As to paragraph 9 of the declaration, the defendants say that the plaintiff is not liable to the third parties referred to in the fifth paragraph for any damage caused by the escape of the said water to the wool, mohair, and other produce belonging to the said third parties and on the plaintiff's premises. The defendants say the plaintiff is not entitled to recover from the defendants any damage caused to the goods of such third parties by the escape of the said water.

13. The defendants admit the tenth paragraph of the declaration, but as to the eleventh paragraph, they do not admit the accounts therein referred to. They deny that the plaintiff has sustained any damage.

14. As to paragraph 12 of the declaration, the defendants admit that they refuse to pay any portion of the accounts referred to in the 5th paragraph.

Wherefore the defendants pray for judgment with costs.

Issue was joined on the replication.

After the replication had been filed, a consent paper was signed, in terms of which the damage

sustained by the plaintiff was admitted to be £156 4s. 3d., and the damage done to the produce of the third parties £672 12s. 9d. No admission of liability was, however, made by the Town Council.

Mr. Rose-Innes, Q.C., and Mr. Benjamin appeared for the plaintiff.

Mr. Solomon, Q.C., and Mr. Searle, Q.C., for the defendants.

Mr. Juta, Q.C., watched the case on behalf of the Port Elizabeth Harbour Board.

Henry O'Shea, the plaintiff, deposed that he was a produce dealer and wool presser, and occupied the premises in question under lease from the Harbour Board. On November 21 last there was a considerable fall of rain in the afternoon. Next day there was a little, and at night it rained heavily. On November 23, between seven and eight o'clock in the morning, he received information which caused him to visit his store. His store was divided into two sections by a wall. One portion of his store was lower than the other. There was a considerable slope of the street. The floor of the lower section of his store below the dividing wall was cemented. The upper portion had a earthen floor. On November 23 he had produce stored in both compartments of his building—the produce consisting of mohair, skins, &c. In the lower section the produce was stored upon the cement floor. In the upper store a layer of planks kept the produce off the ground. His produce had always been stored in that way. When he got to the store he found both cellars flooded with water. In the upper cellar there were 5 inches of water, and a stream of water was running from the door of the lower cellar. A quantity of water had evidently drained through the dividing wall. The water was bubbling up from the street nearly opposite. In a store opposite to his water was being bailed out, and a Harbour Board official was there. Men were beginning to open up the drain at a place where it was covered with sleepers—a break in the ordinary arching of the drain. The sleepers were so placed that water could force its way through them. The block was found 30 or 40 feet lower down. The block was firm, and some of it evidently of great age. The obstruction extended about 30 or 40 feet. He noticed the water was coming in by a crack between the cement floor and the wall in the lower cellar. No water came in at the door. The floor of the lower cellar was 3 or 4 feet below the level of the street, and that of the higher cellar about a foot below the street level. On the 24th the obstruction had not been removed—there was still water in the drain, and the water was still oozing in.

Cross-examined by Mr. Solomon, Q.C.: The streets were always repaired by the Harbour Board when he first took over the property. He spoke to the Harbour Board official at the time he discovered the damage—he did not then know who was the proper person to report to. Mr. Heenan, the engineer of the Harbour Board, had not told him or his partner, Mr. O'Connor, that the floor of the upper store was not a proper store for storing goods. If the floor of the upper cellar had been cemented the water would have got in just the same. The rain-storm on November 21 lasted a quarter of an hour, and nearly an inch of water fell. It carried a quantity of road debris down the steep streets. The Harbour Board men opened up the drain and afterwards repaired it. It was a barrel drain 2 feet 6 inches diameter. He thought the water forced its way through the manhole—he did not think the drain was broken. Much of the stuff which blocked up the drain was quite new stuff which had been washed down by the heavy storm of November 21. The block was all of gravel, no bushes or weeds. A very small proportion of the damaged goods were stored in the upper cellar—between £200 and £300 worth of goods were stored there. He often stored in the upper cellar without "dunnage."

By the Chief Justice: Dunnage would keep goods 3 or 4 inches above the floor. Damage would have been done even if dunnage had been used. Much of the produce injured was stored on dunnage.

Josephus Winter, builder, Port Elizabeth, said he had inspected the drain on November 24. A portion, 200 to 300 feet in length, was blocked extending to beyond Commerce-street. It must have been accumulating a very long time. No cement or mortar had been used in the drain—simply dried bricks. The perpendicular joints were open $\frac{1}{4}$ to $\frac{1}{2}$ of an inch, so that the drain was quite porous. The bricks were specially made to fit. The bricks in his opinion were not made to hold water.

The Chief Justice: To hold what then, gravel?

Witness (continuing) said the manholes were covered with wooden sleepers; they should have been covered with an iron cover.

Cross-examined by Mr. Solomon, Q.C.: The drain was made thirty-two or thirty-three years ago. The block was not continuous the whole 200 or 300 feet, but there were several complete blocks in that distance. The stuff in the drain for a depth of 12 inches was quite black and old. If the drain had been cleared before the rain, there would have been no block. He did not think there could have been water issuing

from the mouth after the block. The mouth was blocked by sand and rubble from the sea. He did not think the water had forced its way through the manhole to get through into the cellar, but through the open joints of the drain itself. It was a well-constructed drain, but ought to have been cemented. He thought that though even cemented, it was just as liable to have become blocked. If the water could not have got through the spaces of the bricks the drain would have burst. The foundations of the store were very fairly constructed, but at one place they were badly built, and water could have got through easily. If there had been a rush of water through the street, the foundations would not have kept all the water out. Without drainage the upper cellar floor was not a proper place to store goods in.

Re-examined by Mr. Innes, Q.C.: When the drain was constructed much of the water that now went into it was led another way. The drain was large enough for the purposes for which it was intended. The ground on which the store was built was formerly swampy.

Alexander Fettes, builder and practical mason, said he examined the drain soon after November 21. The perpendicular joints were very open. The block at the mouth was to the extent of more than half its diameter. He did not think the drain was well made, being without cement. He thought the water was forced into the store through the manhole and the joints of the bricks.

Cross-examined by Mr. Searle, Q.C.: He had never seen bricks of the kind of which the drain was made used in the same manner as in that drain.

By Mr. Justice Upington: He did not consider the manhole a proper one.

George Dix Peek, architect, of Port Elizabeth, put in a plan showing the drain and the area which was drained into it. There was a grating at the smaller or southern entrance to the drain. All the other sluits flowed into the drain without any gratings. Very nearly all the area served by the drain was the natural area. He inspected the drain about December 15. He did not think the drain was properly laid—it should have been cemented. He thought the obstruction was about 60 feet in length. He believed the whole drain had subsided there. He did not think the drain was large enough for the area drained, and the fact of its being in two different shapes in different parts was a disadvantage. The manholes were mere apologies. Considering the weight of water in the drain, it must have spurted from the joints as from a broken hose. The foundations of the store

were sufficient for the purposes of the building. He had superintended the building of some portions of the store in 1870.

Cross-examined by Mr. Searle, Q.C.: The drain did not exist in 1870, so far as he knew, down Harries-street. It did not matter very much whether the grating in question was open or not, though, as a matter of fact, in heavy rains the gratings of the drains in Port Elizabeth were opened. The subsidence of the drain did not alter the capacity of the drain, though it would not improve its capability of carrying off the water and sand. Very nearly half the diameter of the drain was filled with very black, ill-smelling stuff. He did not think if the drain had been cemented it would have burst; it would have filled up to the entrance and then flowed across the street. The gradient of the drain was really more than sufficient in many parts.

Re-examined by Mr. Innes, Q.C.: The floor of the upper cellar was 1 foot 4 inches below the level of the street, and that of the lower cellar 3 feet.

By Mr. Justice Upington: The drain in question was different to the general drainage of the township—it was worse. Generally, however, the drains of the Port Elizabeth township were not large enough.

By the Chief Justice: The immediate cause of the flooding was the neglect of whoever was responsible for the cleaning of the drain where it crossed Commerce-street. He could not swear as to whether the men who were cleaning the drain in December last, when he saw them, were Harbour Board or Corporation workmen.

Mr. Innes here put in a copy of a diagram attached to the original grant in 1853 of that ground to the Harbour Board.

James Searle, manager of the Boating Association, said he had known the locality very well since 1858. Then the water used to flow down Military-road to the sea. There was a sluiceway where Harries-street now was, but part of the drainage flowed on the other side of O'Shea's store. After buildings had been put up, it all flowed down Harries-street. Part of the drain down the upper end of Harries-street was built early in 1860 or 1862, but the rest was an open drain for many years after. More water went down that drain than used to be the case. The drain had been choked two or three times, and had done damage to property—once to the Boating Company's store.

Cross-examined by Mr. Searle, Q.C.: If the old open drain in Harries-street had been left, he did not think heavy rainfalls would have flooded O'Shea's store. The Boating Company made no claim for damage when their store was

flooded. An open drain in Harries-street would be a nuisance and dangerous. The land in that neighbourhood had been sub-divided into blocks by the Harbour Board long before 1881.

Re-examined by Mr. Innes, Q.C.: The streets of the neighbourhood were public streets, lighted by gas by the Municipality. All the stores in that neighbourhood had been considered proper for storing wool.

John Ellwood, storeman, Schofield & Co.'s store, on the opposite side of Harries-street to O'Shea's, said that he considered the bottom cellar of O'Shea's a fit place to store wool in, and the top one if there was dunnage on the floor. On November 23 water flowed into his firm's store. The presshole was filling up fast, the water getting into the presshole through the brick and cement sides, or bottom. He saw O'Shea's store before Mr. O'Shea on the morning of the 23rd, and then there were fully twelve inches of water in the upper chamber. There was a considerable flow of water coming through the partition wall. Water was always bubbling up in the street. He had never seen that drain opened in Harries-street during the nine years of his recollection of it.

Cross-examined by Mr. Solomon, Q.C.: When the drain was opened there was more old débris taken from the drain than new. Harbour Board men cleaned out the drain.

The correspondence having been put in, Mr. Innes closed his case.

For the defence,

Nelson Girdlestone, secretary to the Port Elizabeth Harbour Board since 1876, said he had examined the records of the Board, but could find no records of the construction of Harries-street, though in 1856 it was resolved that the street should be made. In 1857 a section of the proposed drain in Harries-street was ordered to be made. There were no allusions in the records to the connection of the Harries-street drain with the Municipal drain across North Union-street. Since he knew the Harbour Board it had had control over the streets running over the Harbour Board property. Harries-street was wholly on the Harbour Board property. O'Shea's partner had been warned not to put perishable goods into the upper cellar because of the natural dampness of the ground.

Cross-examined by Mr. Innes, Q.C.: There had been no serious conflict between the Harbour Board and Town Council with respect to the divided control over certain streets. In March, 1880, he wrote to the Town Council that the Fleming-street drain was a Municipal drain on Harbour Board property. Harries-street drain was on all fours with Fleming-street drain.

By the Chief Justice : The Harbour Board cleaned the drain after last November's block, because it was damaging the Harbour Board property.

William P. Pinn, Town Clerk of Port Elizabeth for the past seventeen years, said there was no record of the connection between Harries-street and Union-street drains. The Town Council had spent no money on, nor ever exercised any authority over, Harbour Board streets or drains. Repairs were effected at the corner of Harries-street in 1888 by the Harbour Board men, the Council paying half the cost. The Municipal regulations as to buildings did not apply to Harbour Board property. No plan of the sub-division of the Harbour Board's property was ever submitted to the Council. Large quantities of debris were washed into the drains by the heavy rain of November 21.

Cross-examined by Mr. Innes, Q.C. : The Council never took any steps to interfere with the Harries-street drain.

Mr. Robert Hammersley Heenan, engineer and general manager to the Harbour Board, said the Board had always exercised control over the streets and drains on their property. The flow at the outfall of the drain had always seemed quite free, and they had always taken that as an indication that the drain was fulfilling all its functions. He had inspected the drain when it was opened up, and considered it was a properly constructed drain—quite good enough for the purposes for which it had been made. He did not know of his own knowledge that the Harries-street drain had ever been cleaned. When it was opened most of the debris causing the block was new. It was essential that there should be a covered drain in Harries-street or the traffic would be interfered with.

Cross-examined by Mr. Innes, Q.C. : If the drain had been cemented and had then blocked it would have burst with the great pressure of water—at least that was his belief considering the heavy gradient. The drain was of sufficient capacity to carry off the water which was led into it. He agreed that the drain might have been better if it had been cemented. If he had been constructing it he would have laid the bricks in cement.

Charles Arthur Cotter, superintendent of works for the Port Elizabeth Town Council, said that on November 21 three-quarters of an inch of rain fell in half an hour. He took no part in the operations of opening the drain, and had never taken any part in the inspection of the Harries-street drain.

Cross-examined by Mr. Innes, Q.C. : Three drains ran into the Harries-street drain, one of

which was of larger diameter than the Harries-street drain, which was scarcely a proper arrangement.

By the Chief Justice : Harries-street drain was smaller than most of the Municipal drains, but the catchment area of the others was much larger.

John McIlwraith, produce dealer, Port Elizabeth, a member of the Town Council, said that during the space of time in which the rain was falling he considered the fall was larger on November 21 last than at any other period of his recollection. The Town Council had never interfered with the Harbour Board property and had always considered the Board responsible for occurrences there. The debris taken from the Harries-street drain was largely new—the sediment being very slight indeed. It was evidently a fresh deposit. The catchment area of the Harries-street drain was a perfectly natural one. The Harbour Board always repaired the streets on their own property. It was highly improper to store skins on an earthen floor. The water had forced its way through the earthen floor in the upper cellar, and got into the lower cellar through the partition wall. No water would have got into the cellars if the floor of the upper cellar had been cemented.

Cross-examined by Mr. Innes, Q.C. : Much of the stock was lying without dunnage in the upper cellar. There was nothing offensive in the drain ; the debris was almost entirely clean gravel.

William Clements, outside foreman to the Harbour Board, assisted to open the drain, and found it full of fresh clean gravel, save, perhaps, an inch to two inches of sediment at the bottom. There was no smell. Every day the sea outlet was cleaned.

Cross-examined by Mr. Innes, Q.C. : He had never known the drain cause trouble before.

John Watson, platelayer to the Harbour Board, said he went down to the mouth of the Harries-street drain on November 21, and saw the water flowing very rapidly from it. The debris was very clean.

Cross-examined by Mr. Innes, Q.C. : They had to pick the debris with a pickaxe to loosen it at the bottom.

James Head, deputy foreman of the Harbour Board, said he had been in the employ of the Board for the last four years. One of his duties was to watch the outlet of the Harries-street drain. Beyond the need for clearing out the mouth the drain never showed any sign of requiring cleaning. On November 21 he noticed the water coming out of the mouth in a full stream. There was no indication of its being choked.

Cross-examined by Mr. Innes, Q.C.: There were no stated times for cleaning out the mouth—when they were slack of work the men would go round and clean out the mouth of the drain.

By the Chief Justice: The water was running out of the mouth freely after the storm was over.

Cross-examined by Mr. Innes: He could not see if the water was flowing out to the full capacity of the drain. The water was cutting a furrow in the sand and seemed to be coming out freely.

Charles Clements, deputy foreman mason to the Harbour Board, said he went to the drain the day after it was opened by the workmen, and assisted in opening it lower down the street. He had examined the stuff taken out of the drain. It was street gravel, and there was very little sediment. The drain was a well-made one, of good bricks. He connected the open drain in Commerce-street to the Harries-street drain about three years ago. There was not much surface water from the open drain in Commerce-street to the Harries-street drain. The North Union-street gutter joined the Harries-street gutter, and the water of those gutters and of the Commerce-street gutter flowed into the Harries-street drain at the other side of Commerce-street. These gutters would not fill up the drain.

The evidence of Thomas Reeve, clerk of works of the Port Elizabeth Harbour Board, taken on commission, was then read by Mr. Searle, Q.C. It was to the effect that he had been employed by the Harbour Board for the past seven years. He had in the course of his duty to do with the metalling of the streets on the Harbour Board property. The Town Council had done nothing to repair the streets on the Harbour Board property save at the junction of Town Council and Harbour Board property. The Harries-street drain was an old one, and there had been no other stoppage of it than the one of November 23 last in his recollection—had there been one it would have been his duty to have removed the stoppage. The Harbour Board workmen opened the drain after the blockage on November 23. He was quickly on the spot after the report of the blockage and found water oozing out of the street surface in several places above O'Shea's store door. He got a gang of men and had the drain opened, and found it had been blocked for twenty-five yards. The water was oozing out some distance above the stoppage. The debris in the drain was fresh matter. The drain was a round barrel drain and had always carried off all the water required of it. There was nothing defective in its construction, and it was in a good, sound condition. The water

that got into O'Shea's store he believed entered through the foundations. He believed it got into the lower cellar through the partition wall.

Cross-examined by Mr. Innes, Q.C.: All the streets of the Harbour Board property were freely used by the general public. The heavy fall of rain on November 21 must have washed a large quantity of gravel into the drain. It was not the usual practice to lay drains without cement; though he did not know if the drain in question would have served its purpose better if it had been laid in cement. The drain had not "sagged" very much. The bricks of the drain fitted closely all round.

Mr. Rose-Innes, Q.C., in support of the plaintiff's case: The powers and duties of the Council are set out in Act 14 of 1868, section 35. The Council exercises all the powers conferred by the repealed Act 31 of 1860 and by the Ordinance 9 of 1836, sections 45 and 46.

The law is clear that where a public body undertakes the construction of work which is permissive, though not obligatory, the public body is liable for damages occasioned by its misfeasance. *Jordaan v. The Worcester Municipality* (3 Sheil, 195); *Manuel v. Town Council of Cape Town* (Buch. 1877, p. 107).

If the Harries-street drain had been constructed by the Municipality its liability could not be questioned, and inasmuch as they approved of or, at least, consented to the construction of that drain, and allowed, by connecting the Municipal drains with that drain, Municipal water, which caused the damage, to flow into it, they are equally liable. The Municipality practically adopted the Harries-street drain and they cannot escape liability by leading their water to the junction of the two drains and then leave it there careless as to the result. It was also the duty of the Municipality to have kept the Harries-street clear of obstruction, and if the Harbour Board did not do it, the Municipality might have entered on their land for that purpose. *Ludolph and Others v. Wegner and Others* (6 Juta, 193). As to the rights and duties of the dominant tenement, see *Burge* (Vol. III., p. 444) and *Voet* (8, 4, 16).

The drain itself was not large enough to carry off the water from the area drained. Three drains run into the Harries-street drain. One of them is 2 feet 8 inches in diameter and the Harries-street drain is only 2 feet 7 inches in diameter. Again the manholes were not properly constructed. The bricks used in constructing the drain should have been laid in cement.

As to the plea of contributory negligence, the onus is on the defendants.

Mr. Solomon, Q.C., for the Municipality: The Municipality being a creature of Statute its

duties and obligations must be gathered from the Statute to which it owes its existence. The Harries-street drain is a private drain on private property, and no control over such drains is vested by Statute in the Municipality, nor has it any right to interfere with what the Harbour Board does on its own property. The law as laid down in *Jordaan v. The Worcester Municipality* and *Manuel v. The Town Council of Cape Town* is not disputed, but in the present case there was no misfeasance on the part of the Municipality. See *Thompson v. Mayor of Brighton* (L.R. (1894), 1 Q.B.D., 332). The proximate cause of the damage was the stopping of the drain, and this was caused through the negligence of the Harbour Board, for which the Municipality cannot be held liable.

To succeed the plaintiff must prove misfeasance on the part of the Municipality, and in that he has failed. There is no evidence of any negligence in connection with the drains that pass over Municipal ground. The Municipality has no right of property in Harries-street, or in the drains underneath it, nor have they any right to enter on Harbour Board property. *Ludolph v. Wegner* has no application to the present case, as it was clearly for the benefit of the upper proprietors that they should go on the land of the lower proprietors and remove the obstruction which was causing the injury.

In the absence of neglect of a statutory duty the Municipality cannot be held liable.

The plea of contributory negligence is not relied on.

Mr. Rose-Innes, Q.C., in reply: The case of *Thompson v. Mayor of Brighton* would not be followed by this Court, as it would virtually overrule *Hume v. Cradock Divisional Council* (1 E.D.C., 104).

A Municipality although created by Statute has common law rights and liabilities.

Under Ordinance 9 of 1836, the property of and in all . . . sewer, drains, watercourses . . . in, about, or belonging to the said streets or places within the limits of the Municipality was vested in the Commissioners and has been transmitted to the defendant Council.

Cur. ad vult.

Postea (May 20th).

The Court delivered judgment.

The Chief Justice said: This is an action against the Port Elizabeth Town Council for damages caused to certain produce in the plaintiff's stores by reason of an escape of water from the Harries-street drain which found its way underground into his stores. It appears from the evidence that at some time between the 20th and the 23rd of November last the drain

became choked below the plaintiff's stores, with the result that rainwater flowing down in the drain was thrown back, and, owing to the pressure from above, forced its way underground in different directions. Some of the water was forced upwards into the street at the junction of Harries-street with North Union-street, a considerable quantity bubbled up in Scholefield's stores opposite to those of the plaintiff, and a still larger quantity penetrated underneath the foundations of the plaintiff's stores and then rose in the stores. The amount of damage done to the produce is admitted to be £828 17s. Part of the produce belonged to third parties, and although the plea denies the plaintiff's right to sue for damage to goods not belonging to him, that objection has since been withdrawn. There were two manholes in the drain, one being opposite to the plaintiff's stores and the other lower down. One of the witnesses believes that the water escaped through the upper manhole but although some of it may have thus escaped, the greater part, in my opinion, was forced through the open interstices between the bricks of which the drain had been constructed. Instead of cement mortar being used, the drain had been constructed without any mortar binding at all. No one seems to know when the drain was constructed, but it is common cause that it was made, not by the defendant Council, but by the Harbour Board, some time after an upper drain, which now discharges its contents into the Harries-street drain, had been made by the defendant Town Council. This upper drain receives the surface water naturally flowing down from a considerable portion of the Municipal area. It also receives water which has been diverted from its natural course down Bird-street towards the sea. Before the Harbour Board constructed the lower, or Harries-street drain, the water so discharged from the upper or Municipal drain, found its way down Harries-street into the sea in a surface drain. No records exist to show when or by whom the junction between the two underground drains was made. That it must have been made with the full consent of the defendant Council is clear from the fact that seven years ago repairs were effected at the junction at the joint expense of the Council and the Harbour Board. Neither body ever deemed it its own duty to clean or even to inspect the Harries-street drain. One of the plaintiff's witnesses (Mr. Searle) remembers this drain to have been choked before and on one occasion to have burst at the part where it crosses Commerce-street, causing considerable damage to the stores of the Boating Association. Another witness says that the drain is not of the same construction

throughout, being circular above Commerce-street and flat-bottomed below. The obstruction in November last appears to have originated at Commerce-street. Owing to the use of insufficient grating at the points where the Municipal surface water enters the Municipal drain a vast quantity of gravel and débris came into the Harries-street drain, and accumulated underneath Commerce-street. The accumulation was so great that it filled the barrel drain up to the crown for a distance, according to the defendant Council's own witnesses, of over 25 feet. The plaintiff's witnesses say that the distance was still greater. Much conflict of evidence exists as to the nature of the sediment. Some of the plaintiff's witnesses say that there was an old sediment nearly half the diameter of the drain, whereas most of the Council's witnesses affirm that nearly all the stuff taken out of the drain after the accident was fresh gravel. I am bound to say that whenever there is a conflict of evidence I attach greater weight to the plaintiff's witnesses, who, with the exception of the plaintiff himself, are wholly unconnected with the case, whereas all the defendants' witnesses are officials either of the Town Council or of the Harbour Board. I am of opinion that the obstruction was caused by a gradual accumulation of débris until the heavy rain of the 21st of November, when the vast quantity of gravel and débris coming down into the Municipal drain meeting the former accumulation completed the obstruction, and thus forced back the water into the plaintiff's stores. If any water was really seen flowing from the drain into the sea after the storm of the 21st of November, that water must have come from the Commerce-street drainage as well as Harries-street surface drainage, which finds its way into the underground drain at Commerce-street. By the evening of the 21st November the obstruction must have been complete, and any water from rains which fell afterwards and found its way into the Municipal drain, had no means of escape except through the interstices between the bricks. The defendants deny their liability for the damage done on two grounds. There was, say they, no negligence on the part of anyone, but if the damage was caused by any negligence it was that of the Harbour Board and not of the Town Council. The defence of contributory negligence has been abandoned. For the purpose of this case it is unnecessary to inquire whether any liability attaches to the Harbour Board. That body is not a party to this action, and cannot be affected by any decision the Court may arrive at. The only question we are concerned with is whether a good case has been made against

the Town Council. I have already remarked that, until the junction between the two drains was made, the Council was in the habit of discharging into the Harries-street surface drain all the water collected from different parts into its own underground drain. This was the natural flow of the greater portion of this water, and the Harbour Board appears never to have objected to the whole of it coming down in the surface drain. We are in ignorance as to which body first suggested the construction of the underground drain in Harries-street; but let us assume that the proposal was made by the Harbour Board. The Council, as the body authorised by law to make and keep in repair the drains within the limits of the Municipality (Act 14 of 1868, section 35), might have refused to allow any drain connected with its drainage system to be constructed by anyone else. It had the power, on payment of compensation in terms of section 52 of Act 14 of 1868, to make use of Harries-street as a Municipal street, and of course to construct its own drain underneath such street. If the Council did not choose to go to that expense, it still had the power to refuse any connection with the Harbour Board drain, unless satisfied that it was amply sufficient to hold all the water that could be discharged into it, that it was in every respect properly constructed, and that the Town Council would have full powers of inspecting, and from time to time cleaning the drain. There is not a tittle of evidence to show that the slightest precaution of any kind was taken. It was sufficient for the Town Council of that day to know that there was an underground drain towards the sea, and without inquiring into the sufficiency of that drain, it was allowed to be connected with the Municipal drain. Having allowed the connection, the Town Council washed its hands of all responsibility for what became of its own collected waters after they rushed down the steep decline beyond Municipal limits. Worse than that, it took no precautions to prevent vast quantities of gravel and rubbish from being carried into the lower drain. That drain, it must be remembered, was only two feet and six inches in diameter, being less than the diameter of one of the upper drains. Instead of making a new and sufficient drain, the Town Council utilised the existing drain, and by consenting to the connection adopted that drain as part of its own drainage system. It thus undertook the same responsibility for the drain which it would have incurred if the drain had been constructed by the Town Council itself. There is no evidence that the discharge of its upper drain into the Harries-street surface drain endangered any one's property. The Council,

however, elected to discharge its water, mixed with vast quantities of gravel and débris, into an underground channel about the nature of which it knew nothing. As might have been anticipated, the time came when the gradual accumulation of a sediment on a somewhat uneven bottom caused a complete obstruction to the flow of water. It is difficult to say what would have happened if the bricks had been bound by mortar. The drain might have burst or the water might have been forced back through the entrance into the Municipal drain. But no mortar binding was used at all, and we know the result. I am of opinion that both in size and in the nature of its construction the drain was not fit for the purposes for which it was adopted as part of the Municipal drainage system, and that such an adoption was an act of misfeasance as much as if the Council had itself constructed the drain. I am further of opinion that the discharge of waters mixed with large quantities of débris into such a defective drain, without the precaution of inspecting and from time to time cleaning the drain, was an act of negligence. After adopting the new underground drain the Council owed a duty to the ratepayers, of whom the plaintiff was one, not to discharge water into the drain without taking due precautions to secure its sufficiency for the purpose. If the Council failed, on allowing the connection between the two drains, to retain the right of inspecting and cleaning the lower drain, it does not follow that this right could not have been insisted upon afterwards. It was never insisted upon, and was not even asked for. The Town Council having, with the approval of the Harbour Board, adopted the drain as part of its own drainage system, had the power in my opinion to keep that drain in repair. It is evident that the Council never desired to exercise this power. As the choking of the drain and the resulting damage to the plaintiff might reasonably have been anticipated from the Council's negligence in discharging its water, gravel, and débris into a defective drain without due precautions against injury, I am of opinion that the defendant Council is liable in this action, and that judgment must be given for the plaintiff for £828 17s. with costs. I have not cited any authorities bearing on the legal questions raised in argument, because that has already been done in the case of *Jordaan v. Worcester Municipality*.^{*} It was there pointed out that the non-feasance of a duty imposed by law on a public body may, under certain circumstances, render such body liable for resulting damages, and that our own

^{*} 3 Shell, 195. 10 Juta, 159.

law does not altogether agree with the law of England in that respect. In the present case, however, damage has been caused, not by a mere omission to perform an obligatory duty, but by such negligence in the actual performance of a permissive duty as, in the opinion of the Court, amounts to misfeasance. The body guilty of such negligence is, according to the recent case of *Newman v. East London Municipality*,^{*} liable for damages which might reasonably have been foreseen as likely to be caused by such negligence.

Mr. Justice Upington said: I am also of that opinion. During the arguments I was in favour of some of the propositions advanced by Mr. Solomon, but after carefully weighing the rules relating to what is known as causation I have come to the conclusion that the Town Council of Port Elizabeth are liable.

Mr. Benjamin asked for qualifying costs in respect to three of the witnesses for the plaintiff.

The Chief Justice said: There is no doubt that the Court has on some occasions allowed qualifying costs, but they have only been allowed in very special cases, where the Court has derived considerable assistance from the production of plans, &c., and of course where it has been necessary to qualify for the purpose of making those plans. In the present case we do not see such special circumstances as would justify the Court in granting this application. Of course, the plaintiff will be entitled to his expenses as a witness.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendants' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

CAVANAGH V. CAVANAGH. { 1895.
May 20th.

This was an action for divorce instituted by the plaintiff on the grounds of his wife's adultery.

The declaration alleged that the parties were married at Cape Town on 13th March, 1889, and that the adultery was committed in 1893.

That there was one surviving child of the marriage—a boy, aged four—whose custody the plaintiff claimed.

Mr. Graham appeared for the plaintiff. The defendant, who was in default, had been personally served with the summons, declaration, and notice of trial.

Mr. N. Lacy, of the Colonial Office, produced the original marriage certificate.

Daniel Frederick Cavanagh deposed that he was the plaintiff, and that he was married on

^{*} 5 Shell, 41.

March 13, 1889. He and his wife resided at Wynberg for some time. Shortly after marriage a child was born, and a year after marriage the second child was born. They removed to Kenilworth after eight months of married life. They had lived unhappily together, his wife running him into debt. After quarrels, he sent her back to her father. It was now four years since he last cohabited with his wife. About eight months ago he heard various rumours about his wife, and five months ago he had an interview with her in the presence of her father and mother. He taxed his wife with having recently given birth to a child. She denied it, as did the parents. A few days later he again saw her and repeated the allegation, when she admitted the fact but declined to give the name of the father. After the admission he refused to support her. The first-born child was dead, the second child of the marriage was a boy of four years old.

Mary Andrews, a coloured woman, said she acted as midwife on the occasion of the defendant giving birth to a child about a year ago. The plaintiff had pointed out to her his wife—it was the same woman.

The Chief Justice said: I see there has been personal service on the defendant, and the admission to the plaintiff is testified to by him and supported by other evidence. The defendant gave birth to a child last year, although there has been no cohabitation between herself and her husband for the past four years. A decree of divorce will be granted, the plaintiff to have the custody of the child of the marriage.

MCLEOD V. BEEDLE AND CO. { 1895.
May 20th.

This was an application for leave to sign judgment against the respondents, plaintiffs in the action, for not proceeding with their claim.

The facts are these:

On 22nd October last summons was issued against the applicant at the instance of the chairman of the company in his capacity, in which the sums of £14 3s., £172 10s., £34, and £200 were claimed.

On 26th October the applicant entered appearance, and on the same day served notice of the fact on the company's attorney.

The applicant alleged that he had frequently asked the plaintiffs' attorney to proceed with the action, and to serve the declaration, but without avail. That he had also repeatedly asked for a statement of accounts showing how the plaintiffs arrived at the figures £14 3s., as alleged to be due to him, but without avail.

That the action instituted was utterly groundless, and was the result of a suit by himself

B 2

against the plaintiff company in the Court of the Resident Magistrate for the Cape Division, wherein he claimed certain moneys due for rent, and in which the chairman of the company pleaded that the defendant company had a counter-claim which exceeded the jurisdiction of the Magistrate, and claimed the dismissal of the action.

That the applicant agreed to the dismissal of his claim if the defendants promised to proceed immediately with their alleged action in the Supreme Court, and that upon their promise to do so the action in the lower Court was dismissed.

That the time requisite for the prosecution of the plaintiffs' action had now lapsed.

That since the issue of summons Beedle & Co. had been placed under the Winding-up Act, and was now in liquidation with Isidor Hanau, Frederick Heinrich Fismer, and Adolf Wilhelm Heinrich Koch as official liquidators.

Mr. Graham, for the company, contended that the applicant had no *locus standi*, as he had not obtained the required leave of the Court, as provided by Act 25 of 1892, section 141.

The Chief Justice: We grant the leave now.

Mr. Close, for the applicant, urged that the 141st section referred to actions instituted against the company after the winding-up order.

The Court made no order.

The Chief Justice said: The Court will make no order on this application except that the plaintiffs must file their declaration within forty-eight hours and go to trial this term. The question of costs can stand over.

JONES V. TOWN COUNCIL OF CAPE TOWN.

Mr. Graham moved under the 40th Rule of Court for confirmation of the security in the matter of the appeal to the Privy Council. The sureties were Mr. George Smart, Mayor of Cape Town, and Mr. Charles Byworth, Town Clerk.

The order of confirmation was granted.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

BROAD V. ROBERTS'S ESTATE. { 1895.
May 21st.

Mr. Sheil, who appeared for the plaintiff, mentioned this case, which had been set down

for trial to-morrow, and said that a settlement had been arrived at, the terms of which were embodied in the following consent-paper :

1. Judgment is entered for plaintiff for the sum of £250 in full settlement of all claims and counter-claims between the parties to the suit.

2. Plaintiff to stop cutting wood on Grass-ridge No. 2 forthwith, but to be entitled to remove of the wood already cut not more than sixty double loads, or 120 single loads.

3. Plaintiff to have until 31st August, 1895, within which to remove his stock and to take away all the improvements made by him.

4. Mr. Kirkwood to take a tally with the plaintiff or his servants, on behalf of the defendants, of the wood.

5. Each party to pay his or their own costs.

The above represents the terms upon which this suit has been settled, and to judgment being entered accordingly the parties hereto give their consent.

The Chief Justice : Let judgment be entered accordingly.

[Plaintiff's Attorneys, Messrs Tredgold, McIntyre & Bisset; Defendants' Attorneys, Messrs. Van Zyl & Buissinné.]

BRAUDE V. EXECUTOR OF VERDOES. { 1895.
May 21st.
„ 22nd.

Principal and agent.

The plaintiff gave to K. certain sums of money amounting in all to £1,000 for the purpose of advancing the same to the defendant upon security of a bond to be passed by the defendant, but K. only paid £291 to the defendant and appropriated the balance to his own use.

Thereafter the defendant employed K. as his agent to borrow the sum of £1,000 on similar security and gave him a power of attorney to raise the money on mortgage but the name of the agent was left blank.

Held, that, in the absence of proof that the defendant had, before giving the power, authorised K. to receive any moneys on his behalf, the plaintiff was not entitled to recover more than the £291 paid on his behalf to the defendant.

The declaration alleged that in October, 1893, the plaintiff entered into an agreement with the defendant (Verdoes) through his agent, one Keyter, by which the former agreed to advance the latter the sum of £1,000, to secure the

repayment of which the defendant was to pass a first mortgage bond upon the farm Kliprug and the two adjoining pieces of ground.

That the plaintiff subsequently paid the £1,000 to Keyter on behalf of the defendant, but that the latter refused to pass the bond.

The plaintiff claimed :

(a) An order compelling the defendant to pass in favour of the plaintiff a first mortgage bond upon the farm Kliprug and the two pieces of ground adjoining, for the sum of £1,000, with 6 per cent. interest from 1st February, 1894; or in default thereof.

(b) An order directing the defendant to pay to the plaintiff the sum of £1,000, with interest at 6 per cent. from 1st February, 1894.

(c) Alternative relief with costs.

The defendant in his plea denied that he entered into any agreement with the plaintiff as alleged in the declaration, and that Keyter was his duly authorised agent to enter into the said agreement. He alleged that he was not aware that the plaintiff paid the £1,000 to Keyter, and he denied that Keyter was authorised by him to receive the said money on his account.

Mr. Rose-Innes, Q.C., appeared for the plaintiff.

Mr. Juta, Q.C., and Mr. Molteno for the defendant.

The facts appear sufficiently from his lordship's judgment.

The Chief Justice said: In this case there has been much conflict as to the real position which Keyter occupied towards the parties to the suit. Of course it is the plaintiff's case that Keyter was the agent of the deceased, Verdoes, to receive on his behalf the moneys given to him by the plaintiff amounting in all to £1,000. On the defendant's behalf it is contended that Keyter was the agent of neither, but was to borrow the money from the plaintiff and lend it to the defendant. Neither view appears to me to be perfectly correct. I am not satisfied that Keyter had any power of attorney from Verdoes at the time when he received the money and appropriated all except £291 to his own use. The probability rather appears to be that Braude, being desirous not to have his name known in the transaction employed Keyter as his own agent to lend the money to Verdoes upon security of a mortgage bond. Keyter paid only £291 to Verdoes, who must have known that it was advanced by the plaintiff. Thereafter Verdoes gave a blank power of attorney to Keyter to raise the money but the giving of such a power—even if the name of the agent had been filled in—cannot have a retrospective effect so as to amount to a ratification of payments previously made

to Keyter, of which Verdoes had no knowledge at all or from which he derived no benefit. The plaintiff is not therefore entitled to recover the full sum of £1,000 from the executor of Verdoes, but he is, in my opinion, clearly entitled to recover the sum of £291 paid to Verdoes. For this amount judgment must be given for the plaintiff with costs.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissonné; Defendant's Attorney, W. E. Moore.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS K.C.M.G., (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

QUEEN V. ALLIES. { 1895.
May 22nd.

Habitual Drunkard—Liquor Act (1891), section, 28—Police Offences Act (1882), section 9.

Where a prisoner, who was charged before a Magistrate and found guilty of contravening section 9 of the Police Offences Act of 1882, had been during the twelve months preceding the date of his conviction three times convicted of drunkenness and once, within the same period, of contravening section 10 of the Police Offences Act of 1882, and was sentenced by the Magistrate to twelve months' imprisonment with hard labour under Act 25 of 1891, section 28,

The Court, on review, quashed the conviction.

Mr. Justice Upington said: This case has come before me as judge of the week on review from the Resident Magistrate of Oudtshoorn. The accused was convicted before the Resident Magistrate of Oudtshoorn of contravening the 9th section of Act 27 of 1882 by being drunk in the public streets of Oudtshoorn. The Magistrate sentenced Allies to twelve months' imprisonment with hard labour, on the ground that he had been previously convicted four times within the year. The Magistrate, in forwarding the records drew my attention to the fact that one of the convictions within the year had been not for contravening section 9 of the Act, but section 10, which refers to the use of threatening

or abusive language in any public place, and consequently a difficulty arose as to whether this was a case that could be dealt with under the Act providing for this extreme jurisdiction to the extent of twelve months' imprisonment with hard labour. The Magistrate, in his letter to me (but, of course, that I can take no notice of), says that the man at the time he used the threatening language was drunk; but that was not the charge, and consequently it now appears that there have not been four convictions within the year, and the limit of jurisdiction comes to that within the ninth section of the Act of 1882, which gives the Magistrate power to inflict a sentence of a fine of £5, or in default of payment to three months' imprisonment with hard labour. On the whole, the Court is of opinion that the conviction, under the circumstances should be quashed.

HEYNEMANS' TRUSTEE V. LOUBSER. { 1895.
May 22nd

Insolvency—Alleged sale—Pledge—Vesting.

Where certain movables, which were alleged to have been sold, but were really only pledged, by the insolvents in whose possession they remained, and which the Court found had never vested in the pledgee, were taken possession of by the pledgee after the insolvents had filed their schedules,

Held, that the trustee was entitled to the value of the articles.

This was an action instituted by Mr. F. F. Werdmuller in his capacity as trustee in the insolvent estate of D. J. D. & C. J. P. Heyneman against the defendant, a shopkeeper, residing at Vredenberg, in the district of Malmesbury.

The declaration alleged that the insolvents carried on a farming business in partnership at Witteklip, in the district of Malmesbury, and that their estate was surrendered on February 19, 1895.

That on the 9th February, 1895, and after the insolvents had notified their intention of surrendering the partnership estate, the defendant came upon the insolvents' farm and wrongfully and unlawfully and against the will of the insolvents took possession of certain animals, vehicles, and certain other articles, belonging to and the legal property of the partnership estate.

That the value of the articles taken possession of was £200,

That at the date when the defendant wrongfully seized the said articles, he was a creditor of the partnership estate in the sum of £200 or thereabouts.

That the defendant since the date of the seizure had retained possession of the articles, and refused to give them up, and that the plaintiff had sustained damages in the sum of £200.

The plaintiff claimed :

(a) An order compelling the defendant to deliver to the plaintiff the said articles, or to pay their value, £200.

(b) £100 damages, and costs.

The defendant in his plea admitted the seizure. He denied that he was aware that the insolvents had notified their intention to surrender, and he specially pleaded that the articles seized were his legal property, he having bought them from the insolvents in the month of March, 1893, and that he was legally entitled to remove them, being his said property.

He admitted that he retained possession of the articles and refused to give them up.

The plaintiff in his replication specially denied that the articles had been purchased by the defendant from the insolvents in March, 1893.

He admitted that a transaction was entered into between the defendants and the insolvents in regard to the articles, and that on the 27th March, 1893, the insolvents signed a written document purporting to be an acknowledgment that a sale had taken place of the said articles to the defendant for the sum of £254, and that the said sum had been paid in cash by the defendant.

He said that no *bona-fide* sale of the said articles did take place; that no such cash was paid as aforesaid, and that the true intent of the parties in entering into the said transaction, and of the insolvents in signing the said document, was to secure to the defendant a preference over the said articles for a debt then due to him by the insolvents without any delivery of the said articles to the defendants.

Issue was joined on the rejoinder, which was general.

Mr. Rose-Innes, Q.C. (with him Mr. Molteno), for the plaintiff.

Mr. Juta, Q.C. (with him Mr. Buchanan), for the defendant.

The facts appear from his lordship's judgment.

The Chief Justice said : The evidence shows that on February 4 the insolvents prepared their schedules, and that on February 8 a notice appeared in the "Gazette" to the effect that the insolvents intended to apply for the sequestration of their estate as insolvent. On February 9 defendant appeared at the farm of

the insolvents, and from there carried away the goods which are now in dispute. I am perfectly satisfied from the evidence that this was done without the consent of the insolvents—one of them actually objected, and the other one said he would rather say nothing about it. In my opinion on the 9th of February there was not such a delivery as would vest the property in these articles in the defendant if they had not already vested in the defendant before February 9. Under circumstances like these before us, it would be impossible for any Court to hold that there had been any vesting of the property, and I certainly do not think that the circumstances under which the goods were taken can be construed as a delivery to the defendant. The question therefore resolves itself into one of fact: had there been a delivery before that day? It is immaterial from this point of view to consider whether the transaction was a sale or a pledge. Assuming that it was a *bona-fide* sale, there is no evidence that at any particular time these goods were taken possession of by the defendant. The argument is that all the stock were running in the immediate neighbourhood, and that there was no necessity for actual delivery to vest the property in the defendant. If that be the case we had better put an end to the whole law, which requires that there shall be due delivery before the property vests in the person to whom it purports to belong. From the whole evidence I am satisfied that the transaction was never really intended to be an out-and-out sale. It was simply one of those transactions so very frequent in this country, where the creditor makes arrangements with the debtor that certain goods shall be considered as sold to him. They are never taken over, but remain in the possession of the debtor, and only when trouble comes does the creditor go to the debtor and claim the goods. Mr. Juta has urged very strongly that the very fact that the promissory note for £100 was delivered up by Loubser to the insolvents is proof conclusive that it was a sale, but the delivery of the note may have taken place upon the assumption that the deed of sale was a sufficient security. At all events, the presumption is not so strong from that mere circumstance as to rebut the presumption which other circumstances force in this case. When the document had been entered into, Loubser gets Miss Jordaan to write a letter informing the insolvents that on a certain day the promissory note, which had then been reduced to £140, had fallen due, and requesting them to pay that sum over. Of course defendant is made aware how very

damaging that letter was, and Miss Jordaan is brought to prove that it was her mistake, and that she had received different instructions. She said she did not know the £10 was paid off, therefore one would expect £150 would have been the amount she would naturally have named, and not £140—the very amount which was due upon the promissory note. Therefore I am satisfied she is mistaken in saying that she mistook her instructions. Such a mistake is perfectly unintelligible. There are the other circumstances that from time to time payments were made in respect to this note, and these payments were credited to the insolvents. Loubser tried to explain these payments by saying there were other transactions between them, "there were other bills between us at the time, and these payments must have been made in respect to these other bills." The bank accountant, however, says that although there were promissory notes between the parties before 1893, there was no other note in 1893, and therefore Loubser is mistaken in saying these payments were made in respect of other promissory notes. They must have been in respect to this promissory note of £150. It is inconsistent with the sale if that be so. If there had been an out-and-out sale, Loubser could not have called upon the insolvents to pay any portion of this promissory note. Then there is another document which has so far been unexplained. Schonken gave a receipt in which was the item £3 8s., bank interest, but nobody showed what that bank interest was for. In the absence of any information on this point the only presumption is that the £3 8s. was the interest in respect to the only known promissory note between the parties at that time. These circumstances all prove that the transaction was really not intended as a sale, but was intended to be a pledge. Defendant may have really intended it as an out-and-out sale, but in the absence of any delivery of the property—any due delivery of the property to the defendant, there has not been such a vesting of the property as justified the defendant in coming, after the schedules had been filed, and taking away the goods. Under these circumstances I am of opinion that the trustee is entitled to recover the full value of what was taken away, and considering the valuation attached to the goods in the schedule, I am of opinion that £150 represents fairly the amount of the value of the goods and the damages which have been sustained by the trustee in consequence of the removal. Judgment is, therefore, given for £150 and costs.

Mr. Justice Uplington: I am also of that opinion. Transactions of the nature of that

between Loubser and the insolvents are not, in my opinion, to be encouraged, but even if I were not hostile to them the evidence in this case has been so overwhelming on the part of the plaintiff that I should have been compelled to have found for him.

[Plaintiff's Attorney, C. C. de Villiers; Defendant's Attorney, W. E. Moore.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

TWENTYMAN AND CO. V. ZARON. } 1895.
May 26th.

Mr. Tredgold applied for the final adjudication of the defendant's estate.

Application granted.

PETERSEN V. FRAME AND ANOTHER.

Mr. Tredgold applied for judgment for £75; £21 11s. 8d., and £17 5s.

Judgment in terms of consent.

ROLFE, NEBELS AND CO. V. CURTIS.

Mr. Close moved for judgment under rule No. 329, for £111, less £6 paid on account, for goods sold and delivered.

Granted.

GOURLAY AND CO. V. H. S. H. SIMONS.

Mr. Close moved, under rule No. 329, for judgment for £135, with interest and costs of suit.

Granted.

IN THE ESTATE OF THE LATE JOHN G. SCOTT.

Mr. Close applied for authority to the father of the minors Getzkorn to dispose, by public auction, of their share of certain landed property, being lot No. 3 of the Retreat Estate, situate in the Cape Division, bequeathed to them by the said Scott, and to pay the net proceeds into the Guardians' Fund, the land being at present unproductive and the co-proprietors being desirous of selling the same.

Order granted.

THE PETITION OF CATHERINE E. HAWKINS.

Mr. Benjamin, for petitioner, applied for leave to sue *in forma pauperis* in an action

against her husband for divorce, or otherwise for judicial separation by reason of his cruelty towards her.

Referred to counsel.

IN THE MATTER OF THE MINORS VAN DEN
HEEVER.

Mr. Juta, Q.C., applied for authority to the father of the said minors to raise a sum of money on mortgage of the farm Haartebeestfontein, in the district of Albert, for the purpose of satisfying the interest due on a bond over the said property.

Order granted in terms of the Master's report.

VICKERS V. VICKERS.

This was an action for divorce instituted by the plaintiff against his wife on the grounds of her adultery with one Keyter.

Mr. Graham for plaintiff.

The defendant was in default.

Keyter was called as a witness for the plaintiff and admitted having had carnal connection with the defendant.

There was also evidence that the defendant had admitted her guilt with Keyter.

The Court granted a decree of divorce. The plaintiff to have the custody of the child of the marriage. The defendant was declared to have forfeited all benefits conferred upon her under the ante-nuptial contract.

Re DU TOIT'S ESTATE. { 1895.
May 25th.

Insolvency Election of trustee—Confirmation.

At a special meeting of creditors held before a Magistrate for the election of a trustee two creditors, each of whose claim was below £30, voted for O.

One creditor, whose claim was below £30, voted for F.

The Magistrate declared O. elected sole trustee, and the Court confirmed the appointment.

At a special meeting of creditors held before the Resident Magistrate of Aliwal North on the 15th May, 1895, two creditors, who proved for £28 and £27 respectively, voted for the appointment of Dudley James Orsmond as sole trustee.

One creditor, who proved for £26 17s. 2d., voted for the appointment of P. M. Fitzgerald.

The Magistrate declared Orsmond elected sole trustee.

The Master in moving for confirmation of the appointment directed the attention of the Court to the 38th and 40th sections of the Ordinance.

The Court confirmed the appointment.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), and Mr. Justice UPINGTON,
K.C.M.G.]

MILLS'S EXECUTORS V. STALLYS AND { 1895.
OTHERS. } May 27th.

Mr. Innes, Q.C., appeared for the plaintiff, and moved for judgment in terms of the consent paper filed.

Judgment was granted as prayed.

WOLFE V. WOLFE. { 1895.
May 27th.

This was an action for restitution of conjugal rights, failing which for divorce, instituted by Mr. Arthur K. Wolfe against his wife on the grounds of her malicious desertion.

The declaration alleged that the parties were married by ante-nuptial contract on the 29th September, 1891, that one child, a boy, was born of the marriage, and that the desertion took place in March of the present year.

The prayer was for:

1. A decree of restitution of conjugal rights, failing which for divorce.
2. Custody of the child of the marriage.
3. Forfeiture of all benefits under the ante-nuptial contract.

Mr. Molteno appeared for the plaintiff.

The defendant was in default.

Mr. Norman Lacy produced the duplicate original of the marriage register, showing that the marriage took place on September 29, 1891.

Arthur Kilwarden Wolfe said defendant was his wife. Her maiden name was Cole. At the time of the marriage she was a minor. They lived at Wynberg after the marriage. In December, 1892, he went to Vryburg for a month, and when he returned there seemed to be some estrangement between them. On March 1 last she left his house and went to her brother-in-law's, but returned on the 22nd of the same month. On March 27 she left again, leaving a letter behind saying she had no excuse to offer for leaving nor any explanation to give. She could not live with plaintiff any longer. It was no

asking her to return or trying to force her for she would not. She wrote to him from Durbanville in reply to a request that she should return, saying she had thought and re-thought over the matter but did not want to see Cape Town again. He was most anxious for her to come back, and he wrote, asking her to give up the man she appeared to love so much; to live a pure and chaste life, and he would take her away somewhere where they could begin life afresh. He was employed in the Civil Service, and it had been his intention to get a transfer to some place as far from Cape Town as possible. He next heard of his wife from De Aar, receiving a number of letters and telegrams from that place, including some from a clergyman there who was endeavouring to bring about a reconciliation, but, although at first the clergyman urged that the present proceedings should be stayed, he afterwards wrote that his efforts were hopeless. There was a child of the marriage, a boy two and a half years old, of which he (plaintiff) was anxious to obtain the custody. On one occasion she had wired that if he wanted her he must come and fetch her, but he must wire truthfully that he still loved her. He, however, replied that in consequence of her actions all love had vanished and he would simply attempt to do his duty. The defendant in her letters exhibited much love for the child, and on its account was sometimes determined to come back, but she always changed her mind. She admitted she had deeply wronged the plaintiff, but she did not love him, and believed she could be a better woman with the man she loved, provided she had her child, than ever she should be with plaintiff. She felt it impossible to return and give the other man up.

In answer to the Chief Justice, plaintiff said he was prepared to take his wife back if she had not been unfaithful. He wished her to come back.

A decree for the restitution of conjugal right, was granted, defendant to be ordered to return to the plaintiff on or before June 30, failing which a rule nisi was granted, returnable on the 12th July, on which date defendant must show cause why a decree of divorce should not be granted.

On the return day the rule was made absolute and the custody of the child given to the plaintiff.

[Plaintiff's Attorneys, Messrs. Fairbridge Arden & Lawton.]

SLABBER V. NEEZER'S EXECUTORS. { 1895.
May 27th.

Donation—Registration—Minor child—Acceptance by father—Revocation—Majority—Ratification.

Donations proper, as distinguished from remuneratory donations, require registration in the Deeds Office if they exceed the sum of £500 in value, and they are invalid and revocable to the extent of such excess, unless so registered.

A donation by a father to his minor child is completed by such registration whatever the amount may be.

An unregistered donation by a father to his minor child is not deemed to be complete without clear proof of acceptance by the child or by the father on behalf of the child.

Acceptance by the child alone is sufficient if he has reached the age of puberty, but if he is under that age, the gift must be accepted by the Court, the Master, or the father on his behalf.

Whether the minor be under or above the age of puberty the complete acceptance by the father would be sufficient, but such acceptance would be incomplete, as such, without some act done by the father to prove his intention to divest himself of the property, such as delivery to a third person, transfer in the Deeds Office, or, in the case of a cession of action, notice to the debtor of such cession to the child.

The plaintiff's father deposited the sum of £334 in her name in the Savings Bank at a time when she was still under twelve years of age and the Bank credited her with the amount.

Held that, as the Bank was authorised by law to receive deposits from parents on behalf of their minor children, the deposit by the plaintiff's father coupled with the receipt of the money by the Bank to her credit constituted a sufficient acceptance of the donation by the plaintiff's father on her behalf.

Before the plaintiff attained majority her father with her concurrence withdrew the money and dealt with it as his own, and after attaining majority the plaintiff and her husband for several years lived rent

free in a house belonging to plaintiff's father, and received other benefits from him. She became insolvent but did not claim the money, although if she had received the amount her estate would have been perfectly solvent.

No action was brought against the father during his lifetime, but after his death the present action was brought against his executor.

Held, that although the plaintiff's assent to the withdrawal did not prejudice her rights, her subsequent conduct amounted to a ratification of her father's revocation of his gift.

In this action the trustee in the insolvent estate of Thomas C. Slabber sued the executors testamentary of the estate of the late Jno. Christiaan Neezer for the sums of £234 2s. 4d. and £100.

The declaration alleged that T. C. Slabber is married in community of property to Isabella Francina Henrietta Neezer.

That on 22nd December, 1857, J. C. Neezer, since deceased, gave and donated to Thomas C. Slabber's wife £100, and on 24th July, 1862, he gave and donated to her the sum of £78 10s.

That the moneys were placed in the Cape of Good Hope Savings Bank in her name by J. C. Neezer (her father), and interest accumulated upon the said amounts until the end of 1872, when the sums so deposited with accumulated interest amounted to £334 4s. 7d.

That on 14th January, 1873, J. C. Neezer wrongfully and unlawfully appropriated to his own use these sums of money without the knowledge or consent of Isabella F. H. Neezer.

The plaintiff prayed that the defendants might be ordered :

(a) To pay him the sum of £234 2s. 4d. with interest from the 14th January, 1873, and the sum of £100 with interest from the 18th January, 1876.

(b) Alternative relief and costs.

The defendants in their plea admitted that at the end of 1872 a sum of money, amounting with accumulated interest to £334 4s. 7d., was in the Savings Bank to the credit of Mrs. Slabber, who, they alleged, withdrew the same when she was a minor and unmarried, and that she signed receipts for the same.

Mr. Tredgold and Mr. Buchanan appeared for the plaintiff.

Mr. Rose-Innes, Q.C., and Mr. Close for the defendants.

Isabella Francina Henrietta Slabber, wife of the insolvent, said she was a daughter of the late John Christian Neezer, who died March 16, 1894. She was born in 1857, and married on August 23, 1881. Her mother died in 1888, and her brother Andrew died the year previous. When quite a girl she went to the Savings Bank to sign her name to get some money out of the bank. Her father said the bank would give her no more interest, and he was going to put the money elsewhere. Her father had told her before they went to draw out the deposit that there was money in the bank for each of his children. She only remembered going to the bank once. She might have gone twice, once when sixteen years old and once when nineteen, but she did not remember any of them but the last occasion. Three years ago she asked her father to pay a doctor's bill, but he twice refused. The second time she asked him to give her some of her own money, and he said he had none. Before her husband became insolvent she asked her father to stand security for him for £30, and he refused. He had never assisted her or her husband with money. After she came of age she never gave her father authority to use her money. She had never had the use of any of the money placed in the bank in her name.

Cross-examined by Mr. Innes, Q.G. : She was twenty-four when she married. She did not tell her husband that her father had money of hers when she married. She had not required the money, and had not asked for it. She had made no claim for the money till lately, when she found she was entitled to it. There had been a little friction between her and members of the family, because her fourth part of the estate under the will was tied up to be invested for her seven children. There was a further fourth invested for her children and her brother's children. The estate was worth £5,000 or £6,000. She had lived in one of her father's houses eight years rent free. He gave no other assistance, except that he took one of her daughters and supported her.

Re-examined : She had always lived comfortably.

By the Chief Justice : Her father had told her he had deposited the money in the bank for the benefit of his children some time before the withdrawal.

Mr. Sebastiaan Valentine Hofmeyr said he was secretary of the Cape of Good Hope Savings Bank since April, 1879. On December 22, 1857, £100 was deposited by J. C. Neezer, as guardian of the last witness. In 1862, £78 10s. was deposited to the same account. In 1873, £234 2s. 4d. was withdrawn from the account, and in 1876 £100 was withdrawn. Altogether, on dif-

last accounts of which J. C. Neezer was guardian, £1,000 was withdrawn in 1873, and about £300 in 1876.

By the Chief Justice: In 1894, what was left in the bank on that account was considered belonging to the last witness.

George William Steytler, trustee in the insolvent estate of Thomas C. Slabber, said there was a deficiency of £188 in the estate. Witness was secretary of the Colonial Orphan Chamber. On March 1, 1873, the late J. C. Neezer deposited £1,000; on March 2, 1874, £200; in January, 1876, £300, making £1,500 in all. These amounts were all deposits on Neezer's own account. It was now all paid out. The last payment—being £400—was made in January, 1882. In January, 1877, £300 was deposited by Neezer on account of his children, and repaid in 1883. On the same date as the repayment, Neezer paid £158 for some property, and the balance of £142 he re-deposited on the same account.

Mr. William Edward Moore, the defendant, executor of the late J. C. Neezer, said he had done business with Neezer for the last twenty years. He had had no knowledge of the amounts in question deposited in the Cape of Good Hope Bank beyond what had now come out in court, and he did not feel justified in admitting the claim of Mrs. Slabber on those facts.

Cross-examined by Mr. Tredgold: Neezer left no books of account. After Slabber's insolvency, Neezer bought the furniture and lent it to insolvent and his wife at the nominal sum of 1s. a month. On Neezer's death the furniture was appraised and taken over at the valuation.

By the Chief Justice: Witness was convinced that for some years before his death Neezer had helped to support Mrs. Slabber.

Wm. Neezer, brother of Mrs. Slabber, said the Slabbers lived in a house of his father's for eight years. That house now fetched £2 10s. a month rent. He was sure his father had in other ways helped them.

Cross-examined by Mr. Tredgold: He was not now carrying on any business. He had not retired. He kept a trap and horse, not for pleasure, but for working purposes—to take the children to school. He had not received considerable help from his father during the latter's lifetime. He took over the canteen business in 1889 and kept it till 1893. When he took over the business he was to pay one-third of the profits to his father. He had done so; his father had not said in his presence that he had not done so.

Mr. Tredgold in support of the plaintiff's case relied on *Van Roenen's Trustees v. Versfeld* (2 Sheil, 101; 9 Juta, 161); *Thorpe's Executors v.*

Thorpe's Tutor (4 Juta, 488); *Elliott's Trustees v. Elliott* (3 Menz., 86); *Ex parte Hopkins* (4 Sheil, 59); *Voet* (39, 5, 7); *Van der Kessel* (485); *Groenewegen, De Leg Ab, De Institutis* (3, 20, 4—6); *Grotius* (p. 553, note 281); *Rosebloem* (39, 7).

Mr. Rose-Innes, Q.C., for the defendants contended that the action being for *restitutio in integrum* did not lie, as Mrs. Slabber had ratified her father's action in withdrawing the money. He cited *Voet* (4, 44) and *Van Rooyen v. Werner* (2 Sheil, 295; 9 Juta, 425.)

Mr. Justice Upington referred to *Lowin on Trusts*, p. 1,058.

Mr. Tredgold replied.

Judgment was given for the defendants.

The Chief Justice said: For the purpose of this case we may assume that there has been a complete donation to the plaintiff's wife by her father of the sums which he from time to time deposited in her name in the Savings Bank. It will be unnecessary therefore to discuss in detail the various authorities upon the subject of donations to children. In considering this and other questions it should be borne in mind that our laws have undergone a process of development, and that there are few rules of the early Roman Law which can be accepted without some qualification. What appears to be a difference of opinion between writers of authority is often caused by the fact that they wrote at different periods during the intervals of which the law has undergone considerable change. There is no branch of law which has been more altered than that which relates to donations. The early Roman Law regarded the son or daughter, who was still in *familia*, as having no legal existence independently of the *pater familias*. One consequence was that a father could not even make a stipulation with a child under his power, much less make a donation to him. The Dutch Law modified the stringency of the old *patria potestas* and, at an early stage, allowed the father to contract with his child but did not at once allow donations to be made. Subsequently such donations were allowed with certain limitations and the intervention of some public authority was required to give validity to the donation. It is not necessary to trace the law through its different stages as stated by *Grotius*, *Groenewegen*, *Van Leeuwen*, *Voet*, and other writers. The first-named writer quoting a passage from the *Code* said: "Parents cannot legally make a donation in favour of children who are still minors and under their tutelage." *Van der Kessel*, who, it should be remembered, wrote one hundred and eighty years afterwards, says: "Since the reason for the *patria potestas* is

different among us from what it was among the Romans, there is nothing to impeach the validity of a donation made by a father to his son whom he has *in potestate*, and accepted by the son if he has attained puberty, or if below puberty by some public person." The intervention of a public person is no longer deemed necessary if the father has himself accepted the gift on behalf of his child. How then is such acceptance to be proved? A father might, without the knowledge of any one else, even of the child, make a donation to him and then, on behalf of the child, accept the donation, but no Court would hold that such a gift is complete, for it would remain in his power at any time to cancel a gift of which no one else knew. On the other hand he would thus be enabled, if the gift held good, to defraud his creditors by setting up the gift in case of his insolvency. It is to prevent frauds on a large scale that registration of all donations exceeding £500 in value was required, notwithstanding the dictum of *Grotius* (3, 2, 15), to the contrary, but it does not follow that donations to children for that amount or less would be valid unless they had been completed so as to be irrevocable. In the case of *Elliott's Trustees v. Elliott* (3 Menz., 86) the amount of a donation made to a child under eight years of age was upheld, but it is evident from the reasoning of the Court that the result would have been different if the donation had not been completed by delivery and acceptance. In the subsequent case of *Thorpe's Executors v. Thorpe's Tutor* (4 Juta, 488) the same principle was recognised. If in that case Thorpe had kept the policy in his own hands, and given no notice to the Insurance Company of the cession to his children the Court would certainly not have upheld the donation although it was of less value than £500. I have not referred to remuneratory donations which, being founded upon the principle of "consideration," stand upon a different footing from donations in the proper sense of the term, and do not, according to *Voet* (39, 5, 17), require registration at all. It was this class of donations which was dealt with in the case of *Brink v. Van der Byl* (1 Menz., 552), and *Melck v. David* (3 Menz., 468). In regard to donations proper, as distinguished from remuneratory donations, the conclusions to be deduced from the latest authorities are these. They require registration in the Deeds Office if they exceed the sum of £500 in value, and they are invalid and revocable to the extent of such excess unless so registered. A donation by a father to his minor child is completed by such registration whatever the amount may be. An unregistered donation by

a father to his minor child is not deemed to be complete without clear proof of acceptance by the child or by the father on behalf of the child. Acceptance by the child alone is sufficient if he has reached the age of puberty, but if he is under that age, the gift must be accepted by the Court, the Master, or the father on his behalf. Whether the minor be under or above the age of puberty the complete acceptance by the father would be sufficient, but such acceptance would be incomplete, as such, without some act done by the father to prove his intention to divest himself of the property, such as delivery to a third person, transfer in the Deeds Office, or, in the case of a cession of action, notice to the debtor of such cession to the child. In the present case the donation of £334 was made to the plaintiff's wife when she was still under twelve years of age, but it was made by way of deposit in the Savings Bank. The bank was authorised by law to receive deposits from parents on behalf of their minor children, and the deposit therefore by the father of the plaintiff's wife coupled with the receipt of the money by the bank to her credit, constituted, in my opinion, a sufficient acceptance by the father on her behalf. The next question is whether she is entitled to recover the sum deposited from the executors of her father's estate. It appears that after she had reached the age of sixteen she accompanied her father to the bank and signed a receipt for £234, being the amount then withdrawn by him. Three years afterwards she in the same way consented to the father's withdrawal of £100. The gift having been complete she was entitled, on coming of age, to demand an account from her father of the moneys so withdrawn. Nothing of the kind was done, but for years she and her husband occupied a house of her father's rent free and received other benefits from him. Her husband became insolvent during her father's lifetime, but in the schedules no mention was made of the claim which she now alleges she then had against her father. His estate was perfectly solvent and if the sum of £334 had been recovered by the estate of plaintiff's husband to whom she was married in community, that estate would also have been perfectly solvent. No action was brought against the father during his lifetime, but after his death the amount is sought to be recovered out of his estate. The plaintiff knew that her father had withdrawn the money and thus revoked the gift. Her assent during her minority did not deprive her of the right to the money. But her acts after she became of age and until her father's death cannot be reconciled with her

present demand. If the demand had been made in her father's lifetime he might have been able to show that all the money withdrawn had been actually expended on her behalf. She must, in my opinion, be held to have ratified her father's revocation of his gift, and there must be absolution from the instance with costs.

Mr. Justice Upington said: I am fully of the same opinion, for the reasons stated by his lordship. I am satisfied that Mrs. Slabber knew her position both before and after the repudiation by her father, and that her conduct before and after she took action with regard to the withdrawal of these deposits amounted to acquiescence on her part of what her father had done.

[Plaintiff's Attorney, C. C. de Villiers ; Defendant's Attorney, E. M. Moore.]

VERMAAK'S EXECUTRIX V. VERMAAK'S EXECUTORS. { 1895.
May 27th.
June 6th.

This was an action instituted by Catharina Elizabeth Vermaak, in her capacity as executrix testamentary of the estate of her late husband, Theodorus Daniel Vermaak, to whom she was married in community, against Cornelis Johannes Vermaak, in his capacity as executor dative of the estate of the late Johannes Adrianus Vermaak and against the same defendant and Johannes Adrianus Vermaak in their capacity as executors testamentary of the estate of the late Martha Maria Vermaak.

The declaration alleged that on 12th July, 1832, J. A. Vermaak and Martha Maria Vermaak (born Muller), who were married in community, executed a mutual will.

Under the will they appointed each the other, that is the first dying appointed the survivor heir of all the property to be left by the first dying, under the proviso that the survivor should be bound to educate and maintain the children of their marriage until their majority, marriage, or other approved condition, and directed that in case the survivor should enter into a second marriage the estates should be appraised without the minors' portions being paid out. The survivor was appointed guardian of the minor heirs. By subsequent codicils, dated 16th February, 1836, and 7th December, 1847, they altered the provisions of the will in certain respects.

The testator died in 1848 leaving the will and codicils in full force and effect. Martha Maria Vermaak adiated under the will and remained in possession of the whole estate. At the date of the testator's death there were eleven children issue of the marriage, of whom the husband of the plaintiff was one. Thereafter on or about 31st December, 1852, Martha Maria

Vermaak executed a will whereunder she appointed as heirs of her property the children of herself and of the said J. A. Vermaak, her late husband, and the descendants of such children as had predeceased her in place of their parents, upon condition that the said children or their descendants should pay into her estate whatever was due by them to her, as will appear from the copy of the will annexed marked "D."

The said Martha Maria Vermaak died on 13th February, 1893, without having altered or revoked the will last referred to, and the defendants, who were appointed executors thereunder, took out letters of administration and have dealt with the whole of the assets left at her death under the said will and in terms thereof, and have filed an account in accordance therewith. The said Cornelis Johannes Vermaak has been appointed executor dative in the testator's estate.

The said J. D. Vermaak died on or about 13th February, 1885, leaving a will whereunder the plaintiff was appointed executor; his estate was by the said will left to his children.

The plaintiff contends that the will executed by Martha Maria Vermaak on 31st December, 1892, is invalid in so far as it conflicts with the mutual will, and that the estate left at the death of Martha Maria Vermaak must be distributed, in terms of the said mutual will amongst the heirs, namely the children of the testators and the descendants of such as survived the testator but predeceased the testatrix.

The paternal inheritance devolving upon the late Theodorus Daniel Vermaak out of the estate of his father, Johannes Adrianus Vermaak, and also the inheritance which may devolve upon him out of the estate of his mother, Martha Maria Vermaak, were settled by ante-nuptial contract dated 23rd July, 1862, upon the plaintiff.

The plaintiff claimed:

(a) A declaration of rights under the mutual will aforesaid.

(b) A declaration that the will of the said Martha Maria Vermaak dated 31st December, 1892, is invalid in regard to its distribution of the assets of the estate in conflict with the terms of the mutual will: or in the alternative, that the said Martha Maria Vermaak had only the right to dispose of half of the joint estate by the said will of the 21st December, 1892.

(c) That the account filed by the defendants be amended in accordance with the orders made upon prayers (a) and (b).

(d) Alternative relief and costs.

The defendants in their plea admitted the death of the testator in 1848, leaving the will

and codicils in full force; they admitted that Martha Maria Vermaak remained in possession of the whole estate during her lifetime with the consent of all the children; they said that she so took possession as to half of the estate by virtue of her rights as being married in community of property to the testator and as to the other half by virtue of the terms of the will.

They admitted the execution by Martha Maria Vermaak of the second will.

They said that Theodorus Vermaak by his will bequeathed his estate not to his children, but to the plaintiff.

They said that Martha Maria Vermaak had the right to execute the will dated 31st July, 1892, and they said that the heirs instituted under that will are the same heirs as were instituted under the mutual will dated 7th July, 1882.

After the death of the husband, the testator, in 1848, the said Martha Maria Vermaak remained in possession of the entire joint estate during the minority of her children and thereafter until the date of her death, and she did so with the full knowledge and consent of her children who became majors, of whom the late Theodorus Daniel Vermaak was one.

That the said Martha Maria Vermaak personally and in her capacity as executrix aforesaid of the joint estate of herself and her deceased husband, as one estate, made advances to certain of her children as against their paternal and maternal inheritances, and the said children by virtue of dealings with her in respect of the said joint estate became indebted both to the said Martha Maria Vermaak in her private capacity and to her in her capacity as executrix in various sums of money.

Amongst others the late Theodorus Daniel Vermaak was at the date of his death indebted to the joint estate of his parents in the sum of £731, or thereabouts; the said debt arose from the purchase price of 600 sheep sold to and taken over by the late Theodorus Daniel Vermaak at 10s. each, and from the hire of certain sheep and a certain farm which belonged to the said joint estate. The said debt has been brought up as an asset in the account filed by the executors of the late Martha Maria Vermaak.

Even if the framing of the account filed by the executors of the said Martha Maria Vermaak were altered so as to show a separate distribution of the testator's share of the joint estate the amount of inheritance coming to the said late Theodorus Daniel Vermaak from the estate of his parents would be the same amount as is shown in the account as already filed.

Wherefore they prayed that the plaintiff's claim might be dismissed with costs.

Issue was joined on these pleadings.

Mr. Searle, Q.C., and Mr. Watermeyer appeared for the plaintiff.

Mr. Rose-Innes, Q.C., and Mr. Graham for the defendants.

The case resolved itself into one of account.

The Court ordered the account to be amended by expunging an item of £79. The commission to be reduced to £148 18s. 10d., costs to be paid out of the estate of Martha Maria Vermaak.

[Plaintiff's Attorney, Gus. Trollip; Defendants, Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

COLONIAL GOVERNMENT V. LONDON	1895.
AND SOUTH AFRICAN EXPLOR-	May 28th.
ATION CO., LIMITED.	June 25th.
	26th.
	July 2nd

Diamond mines—Maintenance of order and good government — Leases — Rent — Contribution payable

Held, that the defendant company was not liable to pay a contribution to Government for the maintenance of order and good government in respect of claims leased from which no rent had been received by the company

This was an action instituted by the Assistant Treasurer and Receiver-General of the Colony against the defendant company for the sum of £2,636 16s.

The declaration alleged that the defendant company is registered in this colony with limited liability, and is the registered owner of certain farms in Griqualand West, whereon are situated the duly proclaimed mines of Du Toit's Pan and Bultfontein.

That before the agreement hereinafter mentioned the Government of the Province of Griqualand West, and after the annexation to this colony of the said Province, the Government of this colony, collected the revenues of the said mines, more especially the licence moneys due in respect of claims therein, and lawfully

charged against the defendant company the sum of 2s. 6d. per month in respect of each claim by way of fees for good government.

That in or about the month of April, 1881, it was agreed between the Colonial Government and the said company that the said Government should cease to collect the revenues of the mines on the property of the said company, and that the said company should collect themselves all such moneys, and should pay to the Government at the end of each month 2s. for every claim duly licensed during such month in order to defray the cost of good government at such mines.

The said agreement was existing when the Act No. 19 of 1883 was passed and was in terms of the proviso to section 77 of the said Act, not interfered with or affected by the passing of the said Act, but continued to be and is of full force and effect.

In accordance with the terms of the said agreement there are due, owing and unpaid to the Colonial Government various sums of money in respect of claims duly licensed in the mines aforesaid, such sums amounting in all to the sum of £2,636 16s.

That notwithstanding lawful demand, the defendant company failed and neglected to pay the said sum or any part thereof.

The claim was for £2,636 16s. with costs.

The defendants in their plea denied that they are registered as a company in this colony, and said that the title to the farms referred to in the declaration contains no reservation of precious stones in favour of the Crown.

They said that the charge of 2s. 6d. per month was made under and by virtue of the powers and provisions contained in an Ordinance (No. 17 of 1880) of Griqualand West, duly assented to by the Governor and confirmed by Her Majesty, and not otherwise, and that the Government of the Province of Griqualand, West charged the defendants with the said sum of 2s. 6d., deducting the same from monthly licences, rents, or royalties, in accordance with the provisions of the said Ordinance, and not otherwise.

They denied that the agreement set out in the fourth paragraph of the declaration was made between them and the Government in or about the month of April, 1881, or at all.

They denied the 5th paragraph of the declaration, and said that by the agreement therein referred to it was agreed between the Government and the defendants that the sum of 2s. per month should be paid by the defendants to the Government out of the moneys collected or received in respect of licences, rents, or royalties, and not otherwise, and that no such moneys have been collected or received.

The defendants further said that the Government had no power or authority to make an agreement with the defendants for the payment by them to the Government of a fixed sum for the maintenance of order and good government, otherwise than by way of and as a deduction from sums collected or received for licences, rents, or royalties.

They finally denied that the amount claimed was due to the Government and prayed that the claim might be dismissed with costs.

Issue was joined on the replication.

The Attorney-General (Mr. Schreiner, Q.C.) and Mr. Giddy appeared for the Government.

Mr. Solomon, Q.C., and Mr. Searle, Q.C., for the company.

The correspondence having been put in,

Edward A. Judge, sworn, states: I am C.C. and Registrar of Claims at Kimberley. I was appointed Registrar of Claims at the end of 1889. Between October, 1884, and my appointment Mr. Smith was Registrar. Between those periods the defendant company collected for the Government. The amount claimed for Gordon Company in Du Toit's Pan and North-Eastern Bultfontein was paid by defendants' manager in 1891, being balance due up to May. Deductions were caused by sums I had not given credit for. When adjusting account I was aware of compromise between plaintiffs and defendants, but did not know effect of it. I had before me the letter of defendants saying that they had "reverted" to practice of paying only on amount received.

When Act 19 of 1883 was passed I believe Government had no other agreement such as that with defendants of 1881.

Cross-examined: I was not in Kimberley in 1880. From 1889 defendants' manager used to furnish accounts showing amounts received for rent and calculating amount of 2s. per claim on amounts received. This was the uniform practice during my holding of office of Registrar of Claims. The New Gordon Company did not register their lease until 1893 although it commenced in 1891. They may have been registered with Registrar of Claims but I do not think they were.

In September, 1891, when defendant's manager paid I do not think that he had received rents for all claims. The payment was in respect of 218 claims in New Gordon Company and 65 in North-Eastern Bultfontein. It was only in 1892 that the 606 claims were registered.

By the Chief Justice: I accepted payments on the basis of the account put in.

Mr. Solomon admits that the defendants' contention is that they are not liable when they

receive nothing, but that if they receive anything they are liable.

Copy of defendants' form of lease put in.

Government case closed.

For the defence,

John Blades Currey, sworn, states: I have been manager of the defendant company since 1st May, 1884. I succeeded Kilgour. Previous to 1880 Government claimed minerals but it was decided otherwise. I first acted as Registrar of Claims and Collector of Revenue. My appointment was cancelled at my request in 1884. While I was collector I made up an account at the end of every month showing rent received and 2s. per claim paid to Government for every 30s. received. In no month was entire rent paid and I never paid the 2s. in such cases. I have adopted the same course up to the present. Our lessees pay full rent or nothing. In respect of some claims nothing is paid to us. The 65 claims referred to were registered in Claim Office and I have no doubt I received rent. The form of account put in by Mr. Judge is correct. I do not think I have received any rent from Gordon Company. Whenever I received rent I paid Government accordingly. The North-Eastern Bultfontein Company is in liquidation. I proved in liquidation for claim rent (£23, 182) on 671 claims. When liquidator transferred any claims to purchasers he paid us and on that we have tendered to plaintiffs.

Cross-examined: Defendants agreed to exonerate North-Eastern Bultfontein from rent from 1st December, 1893. I have no instructions as to claims of plaintiffs in regard to that. We agreed to exoneration because liquidator agreed to postpone sale of assets. When I ceased to be collector I considered I was still liable to account to Government and I did so. I owed that duty to my company. I do not think I have received any rents from New Gordon Company. I only do what my company tells me. I have not taken any steps to cancel lease or to collect arrears. My company informed me they would arrange the matter in London. I do not know what I paid in December, 1891. I cannot say what I received from Gordon Company, but there was something received. I do not think I made a full settlement in September, 1891. I may have acquiesced in portion of the Government contention.

Re-examined: I presume the New Gordon Company cannot pay as they have not done so.

By the Chief Justice: When I was collector I never paused to inquire whether I was paying under the Act or under the agreement. I followed the practice of paying on amount collected. I can show that no money was paid to

Government on licensed claims from which no rent was received, and the Government knew it.

Further correspondence put in.

Defendants' case closed.

Mr. Schreiner, Q.C., A.G.: An historical survey of the Griqualand West Law as it was in 1881 is necessary. See section 29 of Proclamation No. 5 of 1871, also section 2 and section 3 of Griqualand West Ordinance, No. 17 of 1880. In 1881, the agreement on which this action is founded was entered into. Now this contract is the only one which has been entered into by the Government with a private person. But Act 19 of 1883, section 77 (particularly the proviso), seems to settle the case for the Government clearly, "for it exempts any agreement with any private person." That Act contemplates that books should be kept and shown, and that 10 per cent should be paid: i.e., where there is no agreement. But in the agreement there is no word denoting obligation on the part of the company to show books or to account for the revenue received as rents, licences, &c. The company has indeed furnished lists of claims. Now no Act mentions an amount of 2s. per claim, and if it is paid at all it can only be under the agreement which is now denied, though the company right through the correspondence acts on and admits that agreement. The whole case is in the correspondence, no argument is necessary.

Court: Has the Government a right to put an end to the agreement? If so cannot, the company do so also?

Mr. Schreiner: Yes.

Mr. Solomon, Q.C.: The correspondence and the transaction must be taken as a whole. Now the contract in August, 1880, cannot be terminated except by Act of Parliament, being embodied in the Ordinance of 1880, which is still in force. From August, 1880, till April, 1881, the Government collected the rents, and took 2s. 6d. per claim on claims on which rents were actually received. Till 1881 the question of collecting stood over. Then the company was authorised by the Government to collect rents on their own licensed claims 'for good government' at the rate of 2s. per claim, the Government abandoning 6d. as a consideration for the company collecting. No new principle was introduced, the principle was the same as that in the Proclamation 5 of 1871, and in Act 19 of 1883. See section 77 of that Act. The rent is collected for good government on licensed claims only on which rent is received, but the collection is by private persons and not by the Government, and the proviso does not affect the necessity of keeping books or accounts by the private owner

whether he be the Exploration Company as under the agreement or others. The proviso only states "this section is not to affect any private agreement respecting the amount," and the correspondence shows this was the view of the Government.

The Attorney-General contends that the 2s. 6d. per claim is due on every claim, and that it is fixed high and intended to apply to every claim because Government cannot insist on the production of books and accounts. But these would be furnished if Government chose to insist.

Up to April, 1881, the Government received only 2s. 6d. per claim licensed on which rent was paid. The Government regularly thereafter received accounts from the Exploration Company calculated thus: "On so many claims we have received rent, there are so many 2s. therefore due to you." The Government knew perfectly well how many claims there were in the mines, the Civil Commissioner was also Registrar of Claims, yet this practice continued till 1891.

The Chief Justice: Supposing the Exploration Company become interested in and start a Diamond Mining Company, and then charge no rents on the claims?

Mr. Solomon: Could they do so? The private owner need charge no rents at all; all the Government required was to see his books and simply receive a *pro rata* share of the proceeds.

Licensed claim means one on which, while licensed, rent is due and payable. The Government found their case on the contract not on the Ordinance, though indeed the latter is really based on the contract.

The company is no more estopped by its letters (through Mr. Currey) relied on, than the Government is by the Civil Commissioner receiving the amounts as described above.

Mr. Schreiner: The only agreement in existence was that of April, 1881. But Mr. Solomon refers to documentary evidence prior to the Ordinance of 1880, which he takes as constituting an agreement. The proviso of section 77 of the Act of 1883 applies to the agreement of 1881 which is the only one in existence. From August, 1880, claimholders began to get fixity of tenure by substitution of leases for licences. Up to 1891 the company was vigilant and got the rents in, and therefore it was paid to the Government on the basis of the licensed claims or on basis of claims on which the rent was actually paid. Then came the floating under the Exploration Company of the Gordon and North-East Bultfontein and large arrear rents became due; then the Government insisted on the company paying on the basis of the

contract, which they interpreted as referring to every licensed claim. After correspondence the manager paid up, but then the Board in England turned on him and refused to endorse his action. Section 29 of the Ordinance allows the Government to collect the total amount due (*pro rata* to the number of claims licensed) from the total amount obtained as rents. The "*Ad valorem*" and the "good government" cases were withdrawn with a view to this Ordinance being passed, which then gave the Government the right as before stated to deduct a fixed amount of 2s. 6d. per claim.

Cur. ad vult.

Postea (July 2nd).

Judgment was delivered.

The Chief Justice said: The Government by this action seek to recover from the London and South African Exploration Company the sum of £2,636 16s., being the balance alleged to be due by the company as their contribution towards defraying the expenditure necessary for the maintenance of order and good government at Du Toit's Pan and Bultfontein mines. The defendants do not deny their liability to a contribution, but they maintain that the amount demandable in respect of any claim leased or licensed by them cannot exceed the amount of rent received by them in respect of such claim. The Government, on the other hand, contend that the only test of the company's liability in respect of any claim is whether it is licensed or not, and they base their contention upon a contract entered into by correspondence between the Government and the company in the year 1881. The defendants, by their counsel, admit that the contract of that year must decide the respective rights of the parties, and the only question to be determined will be what is the true construction of that contract. Before considering the terms of the contract, it will be useful to trace the course of legislation and the dealings between the parties which led up to the contract. In the year 1871 Her Majesty's sovereignty was declared over the Province of Griqualand West and, inasmuch as large numbers of diggers had settled there in search of diamonds, it became necessary for the High Commissioner to establish rules and regulations under which the search or digging for diamonds should be carried on. Accordingly Proclamation No. 5 of 1871 was issued, which established such rules and regulations, and further provided for the establishment of diamond-fields upon Crown land, and for the appointment of inspectors of claims, whose duty, amongst others, it was to collect the licence moneys owing to the Crown by claimholders. The rules and regulations relating to

land not belonging to the Crown, but in respect of which the right to precious stones had been reserved to the Crown, were in most respects similar to those relating to Crown lands. In regard also to land not subject to any reservation of precious stones and minerals, the rules and regulations for the order and good government of diamond-fields established thereon were made applicable, but the amount of the licence money could be fixed by the owner, provided it was not less than the amount payable in respect of Crown land; and the Civil Commissioner, after receiving such rent from the inspector, had to account for it to the owner. The 29th section of the Proclamation proceeds to enact that "the balance of such licence moneys, royalties, or rents, after deducting therefrom the proportion of ten pounds for every hundred pounds thereof, or in the like proportion at the least, and such further sum, if any, as may be necessary to defray the public expenditure in respect of the establishment necessary for the maintenance of order and good government at such diamond-field, shall be paid to the owner of such property, as aforesaid." Whatever else may be obscure in this enactment, it is clear that the owner's contribution to the cost of good government was intended to be made by way of a proportionate deduction from the rents actually received on his behalf. It might be 10 per cent. or it might be 100 per cent., but he could not be called upon to pay in respect of any claim more than was actually received in respect thereof. The Government might find that more than 100 per cent. on the amount actually received on his behalf was required for good government, but they could only obtain the contribution by means of a proportionate deduction, which could not in any case exceed 100 per cent. Under that section, therefore, the test of the owner's liability to contribution in respect of any claim was not whether it was duly licensed, but whether any rent had been paid in respect thereof. As was to be expected from the circumstance that no definite proportion was fixed by the 29th section of the Proclamation, disputes as to its construction arose between the Government and the defendant company, who are the owners of the land comprising the Du Toit's Pan and Bultfontein mines. The title to the land has been decided not to be subject to any reservation of precious stones or minerals. On the 23rd of March, 1880, the Recorder's Court at the suit of the company ordered the Government to render an account of rents received and of moneys expended upon good government, but the company appears not to have been satisfied with the basis

upon which the account was to be rendered, for on the 1st of April, 1880, they obtained leave to appeal against the order. Another suit, known as the *ad valorem* suit, was pending between the parties, and a correspondence took place between them with a view to a settlement of all differences. Throughout this correspondence the Government appears to have deemed it its duty to protect the interests of the claimholders as well as its own interests. An agreement was arrived at that in future the Government should receive a fixed sum of 2s. 6d. per claim per month, on condition, *inter alia*, that all pending litigation be withdrawn by the company, and that the claimholders should pay to the company the sum of 27s. 6d. (exclusive of the 2s. 6d. to be paid to the Government per claim per month, which payment should secure to each claimholder one acre (per claim) of depositing sites. I am satisfied, from the terms of the Colonial Secretary's letter of the 17th August, 1880, read by the light of the previous correspondence, that until that time it was never contemplated that the Government should have any right to payment in respect of claims for which they had received nothing at all. It may be questionable whether the Government was to have a first charge for the amount of the tax upon the amount received by it in respect of any claim, but it is clear that it was to have no remedy against the company for anything beyond that amount. The letter of the 17th August, 1880, concludes thus: "The question of the ultimate arrangements to be made with reference to the collection of the amounts must, His Honour considers, remain in abeyance for the present. In the meantime the Government will collect the present licence money, viz., 10s. 6d. (Du Toit's Pan) and 10s. (Bultfontein) per claim per month, but His Honour trusts that when the arrangements as to depositing sites, &c., shall have been finally settled, the company will take steps for the collection of the various amounts from the claimholders." On the 22nd of September, 1880, Ordinance No. 17 of that year was passed. The second section enacts that "in lieu and instead of the charges by the 29th section of Proclamation No. 71 of 1871, for the maintenance of order and good government, it shall be lawful for the Governor in respect to the Du Toit's Pan mine and Bultfontein diggings . . . to charge the price or sum of 2s. 6d. per month for each and every duly registered claim in the aforesaid mine and diggings upon which licences have been duly issued, or upon which rent is due and payable, and which sum shall be deducted from the monthly licences, rents, or royalties collected as in the said section provided." The object of this

section obviously was to legalise the arrangement already entered into with the company, by which a fixed charge of 2s. 6d. was substituted for the indeterminate deduction authorised by the previous Proclamation. The Attorney-General relies upon the words "upon which licences have been duly issued or upon which rent is due and payable" in support of his contention that the test of liability is not whether any rent has been paid, but whether any rent is payable. The words, however, which follow, "And which sum shall be deducted from the monthly licences, rents, or royalties collected as in the said section mentioned," satisfy me that it was not intended to depart from the principle established by the 29th section of the Proclamation, and taken for granted in the subsequent correspondence, that the defendants were not to be liable for more in respect of any claim than the Government had itself collected in respect thereof. Practically however, the Government retained a first charge for the amount of the tax upon the receipts for each claim, because it could deduct the amount from such receipts before paying the balance to the defendants. Thus matters stood when the agreement of 1881 was arrived at. On the 16th of March, 1881, a conference took place between the Commissioner of Crown Lands and the manager of the company for the "discussion of several subjects of mutual interest." On the 12th of April, 1881, the Commissioner wrote to the manager a letter recording the conclusions arrived at on the subjects which had been discussed. Under the heading "Collection of Revenue, August 1, 1880, to March 16, 1881," the Commissioner says: "The sum collected by Captain Yonge on account of the Du Toit's Pan mine and Bultfontein diggings will forthwith be handed over to the company after deduction of 2s. 6d. per month per claim licensed." Then under the heading "Future Collections" the following passages occur: "As soon as is practicable it is agreed that the Government shall cease to collect the revenues of the mines on the farms the property of the company, and that the company shall collect themselves all such moneys, and shall pay to the Government at the end of each month 2s. for every claim duly licensed during such month, in order to defray the cost of good government at such mines. The additional sixpence retained by the Government up to March 16, 1881, is abandoned to the company in consideration of the said company paying all expenses connected with the collection of such revenue. Until the company take over such collection the arrangement laid down in Government letter of April 2, 1881, addressed to you in your capacity of Registrar of Claims and

Collector of Revenue of the Du Toit's Pan mine and Bultfontein diggings, shall be in force." The answer, dated the following day, was to the effect that the statements contained in the letter correctly record the conclusions arrived at. The Government now relies upon the contents of that letter in support of its demand. The words relied upon are that the company "shall pay to the Government at the end of each month 2s. for every claim duly licensed during such month." Taken by themselves, these words would at first sight seem to be conclusive in favour of the Government, but read by the light of the remaining portions of the letter, I am of opinion that they refer only to claims for which revenue should be actually collected by the company. Until that time the Government had collected the revenues, including the rents owing to the company; in future the company were to collect the revenues, including the tax owing to the Government. This would entail expenditure on the company which it was not bound to incur, and in consideration of such expenditure the company was to be entitled to retain 6d. out of every 2s. 6d. so collected. The Commissioner sought in the subsequent correspondence—which cannot, however, affect the construction of the contract—to explain that the reduction of 6d. was made as "a concession, in order to obtain the guarantee of a solvent company," but this explanation is quite inconsistent with the terms of the letter of the 12th April, 1881. It is important to observe that, although the practical effect of the agreement was to make the company the collectors of the revenues, the Government continued in form to be the collector. By the letter of 2nd April, 1881, addressed to the manager of the company he was appointed Registrar of Claims and Collector of Revenue on behalf of the Government, but the salaries of that officer and of such other clerks as might be required, together with all other expenses incidental to the collection of the revenues, were to be paid by the company. The letter proceeds thus: "The whole of the cash collected by you you will be good enough to hand over to the company against their receipt, they having undertaken to pay to Government 2s. per licensed claim per month from the 16th ult. It is clearly understood that this arrangement is only provisional pending the necessary legislative action for handing over the collection of the revenue entirely to the company." The only subsequent legislation on the matter was embodied in the 77th section of Act 19 of 1883. That section recognised the rights of owners of land, the title to which is subject to no reservation, to collect

the rents for themselves, but, wherever a mine had been proclaimed, required a contribution, which was fixed at 10 per cent., towards defraying the expenses of order and good government. This percentage was made payable upon the moneys actually received by the owner, and the only security reserved for the government was that the owner was bound to keep proper books showing the amounts of all moneys received by him. The section, however, contains a proviso, that nothing therein contained should affect any existing agreement, and, under this proviso, both parties are agreed that their respective rights must depend upon the true construction of the agreement of 1881. It was not until 1884 that the manager of the company was relieved of his duties as the formal collector of revenues for the Government. By letter dated the 8th October, 1884, the Government informed the manager of the company that his appointment as Registrar and Collector of Revenue was cancelled. The letter adds, "In accordance with section 77 of Act 19 of 1883, and with the arrangement contemplated in the agreement of 12th April, 1881, the collection of the revenue of the two mines will devolve entirely upon you, as manager of the company, in which capacity you will make the same monthly payments to the Civil Commissioner as heretofore, for the purpose of defraying the costs of good government." Until that time, at all events, the manager, being the Government collector, could not have paid over to the Government taxes in respect of any claim which he had not collected in respect of such claim. It appears, however, that in 1891, that is after the manager had been relieved of his duties as Government collector, he paid to the Government an amount which included a contribution in respect of some claims for which he had received no rent. The fact that the money was paid without protest will debar the company from recovering back any part of it, but it cannot affect the construction of the contract. A stronger argument in favour of the plaintiff's view of the contract is the improbability that the Government would consent to an arrangement by which it is left to the discretion of the company whether they will collect sufficient rents to pay the Government tax or not. But under the 77th section of Act 19 of 1883, a similar discretion was left to other proprietors, and the Government might reasonably have taken for granted that owners of property would protect their own interests. The question does not arise in the present case whether the Government would have a remedy in case the failure to collect the contribution were caused by the

negligence of the owner or by his collusion with the claimholder. It may well be that in either case the company would be liable in damages for negligent or fraudulent performance of their obligations under the contract as collectors, but the pleadings do not allege either negligence or fraud on their part. The only question to be determined is whether the charge of 2s. per claim can be recovered from the company by reason of the mere fact that such claim is under lease to a claimholder. Even if the correspondence and course of legislation before 1881 could not be imported into the case I am clearly of opinion that the company never undertook to hand over to the Government any larger sum in respect of any claim than their manager had collected in respect thereof. Read by the light of such previous correspondence and legislation, I am of opinion that the contract was not intended to deprive the Government of its first charge upon rents collected by the company nor, on the other hand, to confer on the Government any right, in the absence of any proof of collusion or fraud, to more than was collected by the company in respect of any claim. It is admitted that in respect of the claims now in question nothing had been received by the company at the date of the commencement of this action, and the judgment of the Court must therefore, in my opinion, be in favour of the defendants, but in order not to debar the Government from proceeding against the company in some other form of action there will be absolution, but with costs.

The Chief Justice added : I should like it to be made clear whether I am right. I had an impression that it was so, but it does not appear in my notes, that it was admitted that in respect to the claims nothing had been received by the company up to the date of the commencement of this action.

Mr. Giddy : That is so.

Sir Jacob Barry : I have reluctantly, and contrary to my first impression, come to the same conclusion, and for the same reason, which is, that, inasmuch as if the company has collected nothing, and is not culpable for such non-collection the 2s. is not payable.

Mr. Justice Upington : I also concur.

[Government Attorneys, Messrs. J. & H. Reid & Nephew ; Defendants' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

TOUCHER V. ZOER.

1895.
 { May 28th.
 " 29th.

This was an action to recover the sum of £221 17s. 6d. instituted by Mr. Garibaldi Toucher, an engineer residing at Malmesbury, against Mr. Jan H. P. Zoer, a general agent residing at Piquetberg. The declaration alleged that on 13th July, 1894, the plaintiff, acting through his duly authorised manager, Mr. Miller, sold to the defendant, who purchased from him, one 400-gallon iron tank for the sum of £6 7s. 6d.

That this tank was thereafter duly delivered by the plaintiff to the defendant.

That thereafter on or about the 14th August, 1894, a contract was entered into between the plaintiff, acting through his manager aforesaid, and the defendant, in terms of which the plaintiff undertook to perform certain boring operations on the defendant's property at Piquetberg, at a charge of 10s. per foot through soft strata and 30s. per foot through rock, which charges the defendant undertook to pay; the plaintiff also undertook to supply lining tubes as required at current rates.

In terms of the said contract, the plaintiff did sink certain borings and supplied certain lining tubes upon the defendant's property during the month of August, 1894, and received certain payment on account from the defendant.

In consequence of the defendant thereafter repudiating the said contract, the plaintiff discontinued the said boring operations. There is due to the plaintiff in terms of the said contract a sum of £215 10s., after crediting the defendant with the payments made as aforesaid, making a total with the sum of £6 7s. 6d. aforesaid of £221 17s. 6d. [A memo. of account showing particulars was annexed.]

Alternatively the plaintiff says that the defendant is indebted to him in the sum of £221 17s. 6d., being the balance of account for goods supplied and work and labour done at the request, and for and on behalf of the defendant, during the months of July to December, 1894, and January and February, 1895.

The plaintiff claimed:

(a) Payment of the sum of £221 17s. 6d., with interest *a tempore moræ*.

(b) Alternative relief and costs.

The defendant in his plea admitted the purchase and delivery of the tank, but he said that he purchased it from Miller, and not from the plaintiff, and that he had no knowledge of the plaintiff in the matter.

He admitted that he entered into an agreement with Miller as to boring operations on his property at Piquetberg, but he denied that the

terms of the agreement were as stated in the declaration, and he said that the plaintiff was no party to the agreement in any manner, and that he never undertook to become liable, or became liable, to the plaintiff in any sum of money.

That in or about the month of August, 1894, he entered into an agreement with Miller, whereunder Miller undertook to look for water upon defendant's property upon the following terms and conditions: That if the said Miller obtained on or before 1st January, 1895, an amount of fresh water sufficient to fill a 1-inch pipe, and delivered and fitted up three iron tanks in the defendant's garden as directed, together with all necessary piping and a 42-foot windmill the defendant should pay him the sum of £120, to be paid during the month of February, 1895, but if the water found was not fresh the defendant was to pay the said Miller the actual sum expended by him in payment of wages to labourers and the necessary appliances for work, provided that there should be no liability upon the defendant in respect of any boring operations to a greater depth than 75 feet, and that if no water was found the said Miller should not be entitled to any payment.

From time to time the defendant advanced to the said Miller certain sums of money for payment of wages of labourers employed, amounting in all to the sum of £36.

That the said Miller did not find any water by means of the said boring operations, and the said agreement came to an end. The said sum of £36 is still owing by the said Miller to the defendant, or the sum of £29 12s. 6d. after deduction of the amount of £6 7s. 6d. in respect of the said tank. Save as above, he denied the remaining allegations in the declaration, and prayed that the plaintiff's claims might be dismissed with costs.

For a further plea, in case the Court should be of opinion that the plaintiff was entitled to sue in respect of the agreement, but not otherwise, the defendant said that no sum of money was due under the agreement, but that there was owing to the defendant the sum of £29 12s. 6d., which amount the defendant claimed in reconviction, with costs.

Issue was joined on the replication.

Mr. Rose-Innes, Q.C., and Mr. Sheil appeared for the plaintiff.

Mr. Searle, Q.C., and Mr. Buchanan for the defendant.

Mr. Garibaldi Toucher, the plaintiff, deposed that he was a contractor carrying on business at Malmesbury. Miller was his manager. He conducted boring operations, and in June, 1894, sent his manager, Miller, to Piquetberg. Miller

returned in July, having obtained boring contracts from Mr. Versfeld and Mr. Marais. There were regular terms with the two, such as he had never deviated from for the past seven years. His charges were 10s. per foot for soft soil, 30s. per foot for rock, save for granite, which was 35s. per foot. This did not include pipes, windmills, or tanks. On July 17 he sent a 400-gallon tank to Piquetberg addressed to Zoer, and with it was sent an account. On August 24 he was introduced by Miller to Zoer as "the 'baas' of the work." Later in the same day, Zoer said he would send a cheque for the tank by post next morning. The cheque was not sent. On the day last referred to they examined the boring operations on Zoer's property, and he said, "I am afraid we shall have to go deep here—the formation looks like it." He never guaranteed to find water. In September, he commissioned Miller to open an office at Piquetberg in his name, and that was done, and a signboard was erected outside. Zoer's office was in the same building. In October, he again went to Piquetberg, and again Zoer promised to pay for the tank, but did not. The boring was still proceeding in January last. In February last, he met Zoer at the Cape Town Club, and they had a conversation. He asked if Zoer could let him have some money, and the reply was, "Are you responsible for Miller's debts?" He said not for Miller's private debts. Then Zoer said the agreement was that he had to pay £120, and water would be found by Miller, and a windmill, pipes, tanks, &c., were to be provided and erected by Miller. Witness said that was not the case. "The work is to be paid by the foot. You owe me about £160 or £170." Zoer said he would not pay, and witness said he would make him. Next day he wired to Miller, and the work was stopped. He went to Piquetberg on March 1, but Zoer would not talk to him, saying it was after business hours. He then wrote him a letter, enclosing an account for £255 17s., less £72 2s. paid to Miller. That £72 2s. had been reduced to £40 for the purpose of the action, as Zoer had recovered money privately lent to Miller, which was included in the £72.

Cross-examined by Mr. Searle, Q.C.: No document had been signed as to the terms of the contract. He knew Zoer stated that he did not recognise him (witness) in the matter at all. The letter by his attorney to Zoer that he was "agreeable to pay all debts and amounts taken up from him by Miller for the business as well as privately" must have been written under a misapprehension. Zoer had recovered amounts amounting to nearly £50 from Miller, but that had nothing whatever to do with the

boring work. He had visited the boring operations every time he went to Piquetberg during the time they were proceeding. Practically no water was found by the boring. Zoer ordered the tank through Miller. Miller had made a mistake in not getting Zoer to sign the agreement. He did not remember saying he could not rely on Miller's statements always. He had doubted some of his "travellers' tales," but never doubted him on business matters.

By the Chief Justice: He did not go to Piquetberg until after Miller had started on Zoer's work. He usually left it to Miller to make all the arrangements, but his instructions to Miller were that he must have a written agreement before starting work.

Daniel Jacobus Marais, of Meintjes Kraal, Piquetberg, said that on July 13, 1894, Miller began boring for him under a verbal agreement, the terms of which were the same as those named by plaintiff. Water was found at 100 feet; the flow was 8,000 gallons in twenty-four hours with a 1½-inch pipe. Zoer was often at the work. On one occasion Zoer asked what the agreement for the boring was, and was told. On August 15 or 16 he went with Miller to the village, and met Zoer close to the farm, and he said, "I was just coming to see you about boring for me." At the hotel Miller asked him to be a witness if an agreement was made. In a private room Miller told Zoer the terms, and showed him the contract he had made with Versfeld. Zoer declined to sign a contract, saying "You can take my word." Zoer did not object to the terms. Miller said he had accepted witness's word and could not refuse Zoer, adding it was not Toucher's terms to bore without a contract. Zoer afterwards said, "Will you find me water and provide me with a windmill, tanks, pipes, &c., for £120? Witness laughed, and said the windmill, tanks, and pipes would cost that amount. Miller got warm, and said he would not guarantee to find water for £500. Later Zoer agreed to pay the weekly cost of the labour to be employed in the boring, but the charge for the boring was to be paid in February following.

By the Chief Justice: When Miller was boring for him he understood that Toucher was the principal, and he believed Zoer understood the same.

Cross-examined by Mr. Searle, Q.C.: He would not contradict defendant if he said the conversation with Miller was some days before August 14. Zoer was to show the place where the boring was to take place—behind his house. When Miller said he would take on the boring, he understood Miller to mean he would take it on for Toucher. He had no interest in either

party, and was no particular friend of Miller. He had lent Miller £12, which Toucher had repaid.

By Mr. Justice Upington: When they separated on the afternoon of the conversation it was agreed that Zoer was to send for the bore next morning.

William Miller, manager for the plaintiff, said that in June he was sent to Piquetberg. Zoer ordered a tank from him about the middle of June, and the order was sent to Toucher. That had nothing to do with the boring. He had not entered into the usual written contract with Marais, believing he would abide by the terms. He had seen Zoer when boring for Marais and Versfeld, and Zoer asked him the terms, and he told him the same as those on which he was working for the others. When water was struck at Marais' farm, Zoer asked him to come and bore for him. Witness spoke of the meeting between himself and Zoer at the hotel when Marais was present. He there again told Zoer the terms and said that piping, mills, tanks, &c., were extra, and would have to be paid for in addition to the charge for boring. Zoer said something about finding water for £120, and supplying piping, tanks, and a wind-mill in addition. Miller replied that it would be impossible. Zoer had previously asked Marais what he had had to pay for the work on his farm, and Marais had replied about £120. Later at the meeting Zoer again asked if the work could not be done for him for £120, and Miller's reply was that he would not guarantee to do it for £500; as he had his orders as to terms. Zoer afterwards agreed to the terms, but declined to sign a contract, as he said his word was good enough. Next morning he began to bore at a spot, mutually selected, behind the house. When the first lining tube was put down he asked Zoer to measure the tubes, so that afterwards there should be no dispute. Zoer paced the length of the tubes, and said he was satisfied. The boring went on till the middle of February, 1895, when, in consequence of a wire from Toucher, he stopped boring. The amount charged to Zoer was accurate. He received moneys from Zoer from time to time, some on account of water boring, and other amounts on private matters. The latter he had paid—he had been sued for them. Zoer took over some of his "good-fors" from other people, and sued him for the amounts. He had received £40 7s. for boring, and £31 15s. private advances. On August 24 last Toucher came to Piquetberg, and he introduced him to Zoer as the "'baas' of the work." Toucher thought they would have to go about 150 feet,

though witness said he did not think they would require to go more than 120 feet. Zoer said, "In for a penny, in for a pound. I'll go on till I get to Australia, or get whisky." Zoer was regularly informed of the depth they were going. He believed the tank transaction was mentioned on the day Toucher first came, Zoer saying he would pay. Zoer also agreed to pay the wages of the men employed on the work.

Cross-examined by Mr. Searle, Q.C.: My instructions from Toucher were to obtain written contracts. Zoer refused to sign a written contract. Mr. Toucher blamed me very much for not insisting on a written contract. Mr. De Villiers was frequently present during the progress of the work. No contract was entered into behind the house. I may have gone into the garden after the contract had been made, but I am sure Marais did not go. Three or four days did not elapse between the making of the contract and the commencing of the work. The diameter of the tube is 3 inches; that of the pipe 1½ inches. I signed a number of IOU's. When I wanted money I asked Zoer for it. The amounts sued for were due by me to Zoer. I once gave De Villiers (Zoer's clerk) a "good-for" for £5, which I borrowed. I was absent from Piquetberg on every occasion except one, when I was summoned. I was very successful at the Glebe and at Meintjes Kraal. I was sanguine about getting water in the village. I never told Zoer I had made a mistake in not including the tanks in the contract price. I know Mrs. Parrot. If she says that she heard Zoer tell me that he could only pay £120 for the work, she is mistaken. Nothing was said about brack water, and nothing was said about paying my actual expenses if brack water only were found. I understood from Zoer that the well in the garden was brack. The garden is 200 yards long. Zoer said many times that he hoped the water would not be brack. Most of the water in Piquetberg is brack. If Mr. Mutton says that I told him the price for doing Zoer's work was limited to £100, I would contradict him. I remember Mrs. De Villiers on one occasion making a seed-bed. I never told her I had to get half-inch of water, and that if I struck brack water I was to stop. I never admitted in Mr. Scotland's presence that the money for the tank had been tendered to me by Zoer, and that I refused it. When Mr. Toucher arrived in Piquetberg I had bored about twenty-five feet. I had no more wish to bore in the village of Piquetberg than in any other place. I signed in my own name for all amounts advanced to me by Zoer.

Re-examined: I was only sued on my private IOU's.

Cupido Arendse deposed : In August I was employed by Toucher as foreman. I know Zoer. He frequently came to see the work. Mr. Zoer paced the pipes when we first started. He measured the depth in September, when we had gone 106 feet. Both Zoer and his brother measured the depth with a tape-line. Zoer remarked that he thought it was going to be a costly job. I left the work in October. We had then gone 130 feet deep.

Cross-examined : Mr. Miller had told us the well was to be made where the stone was.

Charles Steinberg deposed that he was present when Mr. Toucher told Zoer that the tank was a cash transaction, and had nothing to do with the boring contract. Zoer promised to pay the amount of the tank.

For the defence, Mr. Jan Hendrik Perek Zoer deposed that he ordered the tank from Miller in June, and offered to pay the money when the tank arrived from Malmesbury, remarking to Miller it would have been much cheaper if it had been bought in Cape Town. In August, Miller said, "You need not mind paying for the tank now." In August he asked Miller what his general charges for boring were. Miller said it depended upon the nature of the ground, but the ordinary charge was 10s. per foot through soft ground. I said, "If it does not cost too much, I may go in for water-boring." Miller, myself, and De Villiers then went to the back of the house, and I asked Miller what the cost would be of boring until he found water, of supplying three tanks with sufficient piping to reach the garden, and a windmill. Miller took out his pocket-book, made a calculation, and said, "£120." I said, "All right." He then asked me at what spot he should commence boring. I said, "That is your business, but it must be as near the kitchen as possible." He said he would get water at from 50 to 70 feet, and that the work would be completed early in January, 1895. He undertook to supply me with a flow of an inch of fresh water. I told him that if he reached brack water he should stop working, and that I would pay his actual working expenses. The payment was to be made in February. I deny the statement made by Marais that Versfeld's contract was read over to me. I have never seen the contract, and I never heard of it until the issue of summons in this case. I would not have been such a fool as to enter into a contract which would cost me over £200. Miller commenced boring at once. He frequently borrowed money for me to pay his boys. He never mentioned private advances. The day after the contract was made Miller said to me that he had forgotten to include the tanks in the

contract price, and I said it was too late, we must stick to the contract. I afterwards determined to have two other tanks. I never discussed the matter with Toucher until I met him in Cape Town in February, 1895. I asked him what the business relationship between himself and Miller was. He said Miller is my manager, and is authorised to enter into contracts, but not to receive money. I had previously said to Miller that it looked as though he was not going to find water at all. As soon as the work had stopped, I sued Miller on some of his IOU's. I did not sue on others, as it would have been a breach of contract. The signboard was put up in October. No water has been found. I did not interfere with Miller before January. Miller was sure of getting water, as it would have been an excellent advertisement for him.

Cross-examined: When he ordered the tank from Miller he thought Miller was in business as a water-borer. He believed Miller would order the tank from a Cape Town firm. He did not send the cheque to Toucher, because he had nothing to do with him. He denied having promised to pay Toucher for the tank. He did not remember Steinberg till yesterday, though they lived in the same boarding-house for some time. He believed he did play cards with Steinberg once. He had not arranged with Miller at Marais' farm that he should bore for him. He denied Marais' and Miller's statements that he had met the two on the road near Marais' farm and arranged to talk over terms in the village. Marais was a great friend of Miller's. At the hotel Miller said his terms were from 10s. to 20s. a foot, and nothing further was said. They went out immediately. All Marais' evidence of the conversation in the private room, it struck him, was fabricated. Miller did not come and inspect the site the next day, but four or five days afterwards, and then not by appointment. Although there had been no contract for boring, Miller was going to start straight away. But he stopped him and asked for terms, and Miller said for £120 he would give him an inch of fresh water and go down to 75 feet, together with providing a windmill, tanks, and piping. No document was shown him at the hotel. He was willing to sign a written contract which Miller said he would bring him for signature, but which he did not bring.

Mr. Justice Upington : I have had a good deal of experience, but there is the greatest conflict of testimony in this case that I have ever known.

Witness (continuing) said Toucher was not with him when he agreed to lend Miller money

to pay the wages of the boys. The day after the work commenced, Miller said he had forgotten to calculate for the tanks, but witness said he would keep Miller to his bargain. The boy who said he had told witness that it would be a "dear well," and the other boy who said it would "make him (witness) bankrupt," were both fabricating. He never knew there was any business relationship between Toucher and Miller until after the signboard was put up. Before January he had not spoken to Toucher about the boring. He did not have the conversation sworn to by Toucher in the City Club. They met in the street, but he did not ask Toucher if he was responsible for Miller's debts. Toucher never asked him for payment. He had not sued Miller on all the IOU's—those he had not sued on were all for water-boring. He maintained he could not sue on the others, because he held it to be a breach of contract, and being for above £20, he could not proceed in the Resident Magistrate's Court.

Re-cross-examined by Mr. Searle, Q.C. : Some of the IOU's he had sued on were for money lent to pay the boys engaged on the work.

By the Chief Justice : He had not asked Marais at the latter's farm the terms on which the boring was being done for him. He denied Marais' statement to that effect. He did not know what the idea was of Miller taking him into the private room of the hotel at the time the alleged conversation as to terms took place. Miller was so sanguine about finding water that witness lent him money to pay the boys, although the agreement was to pay nothing if water was not found.

Antony Joseph Becker de Villiers said that he entered the defendant's service as a clerk towards the end of July or in the beginning of August ; previous to this he had assisted Zoer in his business. He kept a boarding-house, and Toucher was brought there on one occasion by Miller. In the latter part of August, behind the house, Zoer and Miller and himself had a conversation about boring, and defendant wished the water to be found near the kitchen. Miller selected a place and Zoer agreed to it, but wanted to know the cost. Zoer said he would not pay too much as he only wanted the water for gardening purposes. He wanted at least an inch of water, three tanks, and a 42-foot windmill and pipes to lead the water to the garden. Miller agreed to do the work for £120, but it might be £5 or £10 over, and Zoer said he would not object to £5 or £10 extra. Zoer told him to stop if only brack water was obtained, and it was agreed that the payment was not to be made till February. He would not say it was the same day that Miller told Zoer he had forgotten to include the tanks in the £120. This conversa-

tion took place in the garden. His wagon was sent for the bore. He thought Miller asked him to send the wagon and paid for its use.

Cross-examined by Mr. Innes, Q.C. : He had become insolvent and Zoer was his principal creditor. He was ready to swear that Zoer had mentioned he wanted the water for gardening. The morning that Miller came Zoer told him (witness) that Miller was coming to inspect the premises. When Toucher came to the office he asked witness if Zoer had not left him a cheque, and he replied "No."

By the Chief Justice : The conversation about Miller having forgotten to calculate for the tanks, occurred on the day of the site for boring being selected.

Maria Elizabeth de Villiers, wife of the last witness, deposed that she saw Toucher first in October last and Miller in September last. Miller talked to her about the boring and said he had to go about 60 feet and deliver about an inch of fresh water.

Cross-examined : Miller was positive he would get water at 60 feet. She was not sure of the date of the conversation.

Mrs. Adriaana Catherina Parrott, wife of the hotelkeeper, deposed that she saw Zoer and Miller in the hotel one day in August, and Zoer said he was going to bore for water, and it would cost him £120, including tanks and pipes. Next day Zoer and Miller came again, and Miller said he had forgotten to calculate for the tanks, but Zoer said he would go no further ; he must hold Miller to the contract.

Cross-examined : She did not remember Marais, Miller, and Zoer being together at the hotel.

P. A. Mouton, farmer, Piquetberg, said he went to see the boring at Zoer's in December, and saw Zoer and Miller, the latter expressing himself sure of finding water. Miller also told him that Zoer was paying him £120. That was in the presence of Zoer.

Mr. Scotland, A.R.M., deposed that he heard Zoer and Miller talking about a tank in March or April last. Zoer said, "Did I not offer to pay you for the tank?" and Miller said, "Yes, you did." Then Zoer said, "Scotland, do you hear that?" Miller then denied that Zoer had offered to pay for the tank. If Miller, in their no such conversation had taken place, he said what was not true. Zoer refused to pass.

Mr. Searle having been heard delayed passing judgment, the Court delivered judgment in the Eastern Districts.

The Chief Justice said : The unfortunate conflict of testimony in October, 1894, they I am quite satisfied in favour of the plaintiff, to Miller acted throughout the Court for an order and that Mr. Zoer is

was but an agent, when entering into contracts, on behalf of Toucher. I am satisfied also that wherever there has been any conflict of testimony between Marais and defendant that the evidence of Marais should be accepted. He appears to be a perfectly disinterested witness. He gave his evidence fairly, and may, in my opinion, be relied upon. His statement is that defendant came to his place, saw what was going on, and inquired the terms upon which Miller had been boring for him, which terms he told defendant quite clearly. He states afterwards that he went with Miller to the village for the purpose of being present at an arrangement between Miller and defendant. I am satisfied that what Marais said took place at the hotel did take place, and if nothing further had occurred between Miller and Zoer at any time after that plaintiff would have been entitled in this action to recover the full amount which he claims. But it seems, however, that before the work actually began there were further conversations between Miller and the defendant, and my impression—a very strong impression I have got on the point—is that at these subsequent interviews Miller gave Zoer to understand that the work would not cost more than £120. I do not believe that Miller would have undertaken to do the work upon the terms stated by defendant, namely, that he was not to be paid at all unless he found water. I do not believe that Miller would have made that contract for one moment; but at the same time there is no doubt that Miller was so sanguine that water would be found that he gave Zoer to understand that the amount of the cost of finding it would not be more than £120, and my strong impression is that Zoer would not have consented to the work being begun if he had thought it would cost him more than £120. This view is strongly supported by many circumstances which have come out in the evidence, and more especially in the evidence of Mr. Molton. He said he saw Miller and Zoer at the hotel, and he asked how the boring was going on, and Miller said, "All right," and that they went to the site. He said, "You be'll never get water there," and Miller said he made'd get it to spout over the house." He read over what Zoer had to pay, and he said and I ne'r was present, and said nothing. of summongo conditions named. The reply have been su'20, not £120 in case water is contract which from this evidence, and from Miller commenced b Villiers and of other wit-borrowed money fo'zn't accept the whole of the never mentioned p'resses for the defendant—after the contract was m'pression, that the that he had forgotten to in've gone into this

work if he believed that it would cost him more than £120, and if the plaintiff's agent, Miller, had not been responsible for that view taken by the defendant. That being so, the only question is: Was plaintiff justified in telling Miller to stop? After the conversation which took place between defendant and plaintiff in Cape Town, the plaintiff could not have allowed his agent to proceed further with this work because Zoer had told him he (defendant) was not responsible for any portion of the work done by Miller. That was a clear repudiation of any liability to the plaintiff, and on that repudiation plaintiff was justified in saying, "I will stop the work now and I will claim for the amount to which I am entitled." The Court has now to assess that amount, and seeing that Mr. Innes does not raise any very strong objection to our assessing the amount at £120, the Court will adopt that amount as the basis of its judgment. There is also to be added £6 7s. 6d. due for the tank, and also £3 17s. for lining pipes. The £120 I consider simply for the boring.

Mr. Searle said the evidence of the defendant showed that the £120 was to include tanks piping, &c., as well as boring.

The Chief Justice said: We do not accept Zoer's evidence, and my strong impression is, if I am forced to decide between the two, I shall accept plaintiff's version completely. Therefore it is only for the benefit of the defendant and to prevent the Court having to express its view as to the evidence given in this case that the Court accepts the view that there might have been some misunderstanding. It is clearly understood that £120 would be the maximum sum we should allow in respect of mere boring, and as the pipes are independent of the boring their cost will be allowed. Judgment is therefore given for the plaintiff for £130 4s. 6d., less £40 7s., which the plaintiff admits has been advanced to Miller in connection with the work. That makes £89 17s. 6d., for which amount judgment is given for the plaintiff with costs.

[Plaintiff's Attorney, D. Tennant, jun.; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice), and Mr. Justice UPINGTON,
K.C.M.G.]

PROVISIONAL ROLL.

THERON V. BARNARD. } 1895.
May 30th.

Mr. Close applied for provisional sentence on a mortgage bond for £825, which was due owing to non-payment of interest.

Granted : property declared executable.

GENERAL MOTIONS.

MOCOLLA V. TAYLOR.

Mr. Molteno applied for an interdict restraining the respondent and the Standard Bank from parting with funds believed to be in their possession or about to arrive, pending an action by applicant against the said Taylor for the recovery of £12 13s. 6d., the amount of a dishonoured cheque.

The application was refused, the applicant having his remedy by action.

HAYWARD V. GERDS' TUTORS } 1895.
DATIVE AND Curator ad Litem. } May 30th.
Minor—Landed property—Sale by tutors
dative—Transfer.

Tutors dative ordered to pass transfer to the purchaser of a farm, the property of a minor, the Court being satisfied that the price paid was fair and reasonable, and that the sale was to the interests of the minor.

This was an action instituted by Mr. W. J. Hayward to compel transfer of a farm bought by him from the first-named defendants in their capacity as tutors, duly confirmed by letters dated 7th June, 1893, of the minor Frederick H. A. Gerds.

The declaration alleged that on 7th July, 1893, the first-named defendants, in their capacity, sold to the plaintiff, who purchased from them, a certain farm called Elands Poort, situated in the division of Willowmore, for the sum of £1,300. The said amount was a fair and reasonable value to pay for the said farm in the interests of the said minor.

That the sale was made subject to the approval and ratification of a competent court, as being to the interests of the minor, and that

thereafter, in October, 1894, the Honourable the Court of the Eastern Districts made an order approving of and ratifying the said sale.

The sale was concluded on terms that the plaintiff should pay all commission and expenses connected with the said sale and with the transfer of the property, and on 7th July, 1893, the plaintiff paid the defendants the full purchase price of £1,300, and also a further sum of £100 to cover transfer duty, commission, and expenses, the defendants undertaking to defray the said duty and expenses thereout, and to do all things necessary to effect transfer of the said property. Since the said date the defendants have received various sums of money, being for the rent of the said farm.

That the plaintiff has always been and still is ready and willing, and has tendered, and hereby again offers and tenders to do all things on his part necessary to effect transfer of the said property, and to pay all lawful expenses connected therewith, but the defendants wrongfully refuse to pass transfer to him or to account to him for the said sum of £100 paid by him as aforesaid.

The plaintiff prayed against the defendants in their capacity :

(a) An order compelling them to pass transfer to him of the farm Elands Poort, he undertaking to do all things on his part necessary to effect such transfer, and to pay all expenses lawfully incurred in connection therewith.

(b) An order compelling them to render an account of all rents received by them in respect of the farm since 7th July, 1893, and to pay over to him any balance shown to be due at the foot of the said account.

(c) Should this Honourable Court be of opinion that the order of the Eastern Districts Court was not a sufficient confirmation of the said sale as required by law, then an order of this Honourable Court confirming the said sale as being in the interests of the said minor.

(d) Alternative relief and costs.

As regards the first-named defendants in their individual capacity, the plaintiff prayed for an order compelling them to render a proper account of the £100, and to pay him any balance shown to be due upon debate thereof.

The tutors, who had been barred, but by consent were allowed to purge their default on paying the costs occasioned thereby, in their plea admitted the sale and the receipts of the moneys. They denied that they refused to pass transfer, and said that they delayed passing transfer at the direction of the Eastern Districts Court.

They said further that in October, 1894, they applied, with the knowledge of the plaintiff, to the Eastern Districts Court for an order

sanctioning and confirming the sale, and that the Court referred the application to the Registrar in the interests of the minor, and that upon consideration of the Registrar's report the Eastern Districts Court confirmed the sale upon certain terms of payment.

The defendants finally said that they acted *bona fide*, and considered that they were acting in the best interest of the minor, and under and by virtue of the order of the Eastern Districts Court. They submitted to judgment, but prayed that no order as to costs should be made against them.

The *curator ad litem* specially pleaded that the sale and purchase were not to the benefit or interest of the minor by reason that the property was sold for considerably below its real value, that there was no necessity for the sale, and that the property if put up to public auction would have fetched considerably more than £1,300.

The facts appear sufficiently from his lordship's judgment.

Mr. Searle, Q.C., for the minor contended that the farm had not been sold for its true value and relied mainly on the evidence of the present lessee, who stated that he was willing to give £1,500 for it.

The Chief Justice said: In this case it is quite clear that Mr. Hayward purchased the farm Elands Poort from the two tutors, Gerds and De Villiers, for the sum of £1,800, and that he paid the full sum of £1,800 to them; that in addition to the £1,800 he paid a further sum of £100, and this £100 was paid for the purpose of defraying the costs which the tutors would incur for the purpose of transfer duty, &c., and obtaining the requisite order of the Court. It is quite clear also from the evidence that it was left to the tutors to obtain the requisite order of the Court—in fact partially for that purpose the sum £100 was handed over to them. It was the duty, therefore, of the tutors to apply to a competent Court having jurisdiction, for the necessary order. Instead of so applying they applied to the Eastern Districts Court, which had no jurisdiction in respect to the land belonging to the minor, which was not situated in the Eastern districts of the Colony, but is land situated in the district of Willowmore, which has been cut off from the district of Uitenhage, and is now within the Western districts, so that the Eastern Districts Court had no jurisdiction. If there had been no evidence before the Court as to the value of the land the Court would at once have said that the order of the Eastern Districts Court should be set aside and full inquiry made into the value of the land.

A full inquiry has, however, been made by the Eastern Districts Court, the matter was submitted to the Registrar of the Court, much evidence was taken on the point, and taking such evidence into consideration the Eastern Districts Court came to the conclusion that £1,300 was a fair price to be paid for the property. This Court has since authorised the minor to appear by his *curator ad litem* for the purpose of challenging this order. The question now is has the *curator ad litem* satisfied the Court that £1,300 is a wholly inadequate price to pay for the farm. Several competent witnesses have said it is a fair price to pay for the property, and the only witness called to say that it is not a fair price is the lessee of the farm, who says he is prepared to pay £1,500, but goes no further than that—that is, he offers no security. The Court might now set aside this sale, and in the end the minor might not get the £1,500. But that is not the test exactly. The test is the true value of the farm. If the gentleman who is now the lessee is willing to pay £1,500 for the farm it ought not to influence the Court upon the question as to whether if application had been properly made to the Supreme Court in the original instance, and the evidence given had been the same as was given before the Eastern Districts Court, whether upon that evidence the Court would not in all probability have made a similar order to that which has been made by the Eastern Districts Court. I am not satisfied in my own mind that £1,300 is not a fair price, and if it is a fair price it is to the interest of the minor that the property should be sold. The interest to be derived from £1,300 will be more than the rent derived from the farm, and therefore I think, on the whole, that it was a fair sale. The burden of showing it was not a fair sale lies upon the *curator ad litem*, who represents the minor. The Court will, therefore, confirm the sale. The next question is the question of costs. It is quite clear that Hayward is entitled, having succeeded in his action, to recover his costs, either from the tutors personally or from the minor. The costs have to be paid, and the question is, who shall pay them? In my opinion, the tutors dative are responsible for all the costs, except the costs of the *curator ad litem*, and they should pay them. It was their duty, as it was left to them in the contract with the plaintiff, to apply to the Court—to apply to a competent court having jurisdiction, and to do so immediately—to pass transfer. But instead of which they own to having kept the purchase money in their hands for eighteen months before applying to a court at all. It should have

been done forthwith. They should have obtained the consent of a competent court to deal with the property at once, instead of doing so they lie by for eighteen months with the money in their hands, and then apply to the Eastern Districts Court, which has no jurisdiction. They should therefore, in my opinion, now pay the costs. They are also bound, in my opinion, to account for all rents and profits received by them out of and in respect of the farm during the interval in which they have had the money in their hands. I don't blame Gerds personally, because he left the matter in the hands of De Villiers; but he is to blame for allowing his co-tutor to retain this money without seeing that immediate application for dealing with the property was made to a competent court. He must suffer for his default. Whatever remedy he may have against De Villiers is another question which we cannot now decide. The tutors then are to be compelled to transfer the farm, account for all rents and profits received in respect of the farm, and also render an account of the £100, which has also been paid to them by the plaintiff. As to the costs of the *curator ad litem*, I think they may fairly come out of the estate, for in respect to these costs the tutors are not responsible. Judgment will therefore be entered for the plaintiff in terms of prayers (a), (b), and (d) of the declaration—costs against the defendants Gerds and De Villiers *de bonis propriis*. The costs of the *curator ad litem* to come out of the estate.

Mr. Justice Upington: I am of the same opinion upon every point.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfret; Tutors' Attorney, C. C. Silbrbauer; Minor's Attorney, Gus. Trollip.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

AFRICAN BANKING CORPORATION { 1895.
V. BOND. { May 31st.

Mr. Maskew applied for the final adjudication of the defendant's estate.

Granted.

VAN DER SPUY BROTHERS V. LOEWENTHAL.

Mr. Maskew applied for final adjudication of the defendant's estate.

Granted.

KING V. VOIGT.

Mr. Benjamin applied for judgment under Rule No 329 for £35, together with costs of suit.

Granted.

HOFMEYR AND REGTER V. PAGE.

Mr. Close applied for judgment under Rule No. 329 for £2 6s. 5d., together with costs of suit.

Granted.

VAN DER BYL V. REYNEKS.

Mr. Shippard applied for judgment under Rule No. 329 for £54 10s. 2d., together with interest *a tempore moræ*, and costs.

Granted.

COLONIAL GOVERNMENT V. { 1895.
SILO. { May 31st.

Crown lands—Recovery of rent—Ordinance 9 of 1844—Civil Commissioner's writ.

Where there had been a return of nulla bona to a writ issued, in respect of rent overdue, by a Civil Commissioner under Ordinance 9 of 1844 and provisional sentence was afterwards prayed for the amount of the rent, The Court treated the matter as an illiquid case, granted judgment, and declared the property executable.

This was a prayer for provisional sentence for the sum of £5 1s. 3d., less 14s. 9d. paid on account on 1st April, 1895, which, the summons alleged, the defendant owes to the plaintiff upon and by virtue of a certain writ issued by the Civil Commissioner of Stutterheim on the 5th October, 1894, under the provisions of Ordinance No. 9 of 1844, and addressed to the messenger of the Court of the Resident Magistrate of Stutterheim, and which writ was, after execution, returned by the messenger with an endorsement setting forth, *inter alia*, that no goods or chattels belonging to the defendant were either pointed out or, after diligent search, found whereof the exigency of the said writ or any part thereof could be made.

The defendant was also called upon to show cause why the following landed property, mentioned in the writ, namely, building lot 2 (b), garden lot 30. Bethel Mission-station, should not be declared executable for the sum above demanded.

The Attorney-General (Mr. Schreiner, Q.C.), with him Mr. Giddy, in support of the motion: The Government has under section 4 of Ordinance 9 of 1844 taken out a writ authorised by the section, and there has been a return of *nulla bona*. The property is unmortgaged, and therefore sections 8, 9, and 10 do not apply. The property is a small one, and the expense of the proceedings to cancel the title and then to dispose of it would amount to more than the value. The sale by the Sheriff in execution would be a more economical course, and therefore provisional sentence is prayed on the unsatisfied writ and execution on the property. Service has been effected on the defendant, and he is in default.

The Chief Justice said: It is proposed that the Court should treat the Civil Commissioner's writ under the 4th section of Ordinance 9 of 1844 as if it were a judgment of a competent Court. I can see great difficulty in holding this view. Referring to the 3rd section of the Ordinance, I find that if due objection is made by the defendant—by the lessee—and proper security given, then the Civil Commissioner shall forthwith cause proceedings to be commenced in some competent Court for the recovery of the rent in controversy, and shall not resort to the remedy by distress and sale as in the next succeeding section mentioned. The fourth section provides in case no such objection shall have been lodged, or if lodged shall have been disallowed, and in case no security shall have been given—in that case it shall be lawful for the Civil Commissioner to give the messenger authority to seize and arrest all goods and chattels, &c., and this excludes a competent Court. I find great difficulty in holding that the writ is in the nature of a judgment of a competent Court, but I see no reason why the defendant should not be sued for the rent. In the present case he has been sued for the amount of the rent due to the Government, and has made no appearance; and when no appearance is made, and no objection is taken to the form of the summons (it is in the form of a liquid case not of an illiquid), the Court will not interfere. In the present circumstances, the Court may take it as an illiquid case—claiming rent, and claiming that the property may be declared executable. It is not usual to declare property executable in illiquid cases, because in most cases it cannot be proved that the defendant has not the goods to satisfy the amount of the judgment. But in the present case there has, it appears, already been a writ issued against the goods and a return of *nulla bona*. Under these

circumstances, there is nothing to prevent the Court from declaring the property executable, and this course is unquestionably sanctioned by the 36th rule of Court. The Court will therefore, seeing that there has been a return of *nulla bona* to the writ, grant judgment by default against the defendant for the amount claimed, and declare the property executable with costs.

Mr. Justice Upington said: I am also of that opinion. I should have had some difficulty if there was not such clear proof of the incapacity of the defendant to produce other property to satisfy the exigencies of the writ.

[Government Attorneys, Messrs. J. & H. Reid & Nephew.]

Ex parte ROSSOUW. } 1895.
Ex parte KAY. } May 31st.

Insolvent Ordinance—Section 106—Discharge—Composition—Liability on preferent claims continued.

The Court, under the 106th section of the Ordinance, granted the discharge of certain insolvents who had entered into a composition with their creditors in terms of which they were to remain liable on the preferent claims against their estates.

These were applications for the discharge of the insolvents from sequestration under the 106th section of the Ordinance.

At the third meeting of creditors in the first estate the insolvent proposed in terms of 106th section that the sequestration of his estate should be declared at an end, and that he should be re-invested with his estate, on condition that the mortgagee should retain his first mortgage as proved by him on all the insolvent's assets, that the insolvent should pay a compromise of £87 16s. 10d. in full discharge of a claim of £205 17s. 9d., and that he should also pay the costs of administration.

At a subsequent special meeting of creditors the proposal was, with a slight variation, approved of by the creditors who had proved on the estate.

The insolvent paid the amount of the compromise and the costs of administration.

The creditors consented in writing to the present application, notice of which had been duly published in the "Gazette."

The prayer was that the insolvent might be discharged save as to the mortgage bond, and re-invested with his estate.

In the second case the facts were similar. The insolvent offered a composition of 2s. 6d. in

the £. to be paid within three months, and to take over the preferent claims and remain liable on the same.

At the meeting at which this proposal was made one of the concurrent creditors, who was also a preferent creditor, voted in favour of the proposal on condition that his preferent claim was not affected.

In neither case had the Master given a certificate.

Mr. Juta, Q.C., appeared for Rossouw.

Mr. Sheil for Kay.

The applications were granted.

The Chief Justice said: The difficulty, which I understand the Master has in this case, is that the Court is asked, under the 106th section of the Ordinance, to discharge the insolvents from all their debts, which were due at the time when the estates were sequestrated, and from all claims and demands claimable against their estates, and to declare the sequestrations at an end and the insolvents re-invested with their estates, whereas in terms of the composition the insolvents are not discharged from their debts, but on the contrary, remain liable to the bondholders. But the difficulty is met by the reservation in the 106th section . . . but reserving, however, always the claims of creditors for such composition or security for composition as may have been agreed for and be still unexecuted. Supposing the terms of the composition were that a debt had to remain, but was to be paid off in instalments extending over a period of years, the debt would undoubtedly remain, but only under the composition. In the present case the composition is that the preferent creditors retain their securities. So far it may be said that there is no composition, but the agreements must be taken as a whole, and taken as a whole the concurrent creditors in the one case accept a lump sum by way of compromise, and in the other case they accept 2s. 6d. in the £. The compositions are, in my opinion, in terms of the 106th section of the Ordinance and the applications will be granted as prayed. The Master was quite justified in having the matters brought specially to the notice of the Court. In future in similar applications there must be a special certificate by the Master.

[Rossouw's Attorney, G. Montgomery-Walker; Kay's Attorneys, Messrs. Van Zyl & Buissinné.]

IN THE ESTATE OF THE LATE JOHANNES G. STEYN.

Mr. Juta, Q.C., applied for authority of the widow of the said Steyn to take over the landed

property of the estate in which she has a life interest at a price agreed upon between herself and the major heirs (£500), subject to the condition that the shares due to the three minor heirs shall be calculated as though the purchase price had been fixed at certain larger amount (£850) at which the premises were valued in April last.

Order granted in terms of the Master's report.

IN THE MATTER OF THE ANTE-NUPTIAL CONTRACT OF JOSHUA D. DU TOIT AND ALICE H. BLOXAM.

Mr. Close applied for an order authorising the Registrar of Deeds to register the said contract, notwithstanding that the time fixed by law for the filing of the same has elapsed.

Granted.

SMITH V. SMITH.

Mr. Sheil moved that this matter stand over *sine die*, in consequence of the non-arrival of the necessary documents from Australia.

BROOKFIELD V. BROOKFIELD.

Mr. Maskew applied for an extension of the return day for the edictal citation in this case to July 12, and an alternative order for service.

The extension was granted. Personal service, failing which one publication in the Pretoria "Press."

The Court refused to hear several other matters in consequence of their not being on the list.

PARKIN V. LIPPERT AND PARKIN.	{	1895.
		May 31st.
		June 10th.
		„ 24th.

Usufruct—Lease—Sub-lease—Assignment of lease—Insolvency of lessee—Insolvent Ordinance, section 104—Improvements—Tacit re-location.

A life usufructuary has no right to grant a lease extending beyond the period of his own life.

The insolvency of a lessee puts an end to the lease, although the land may have been sublet by the lessee for the full period of his term.

The insolvency of the lessee would not terminate the lease if, before the date of the insolvency, there had been a complete assignment of an assignable lease to a third party, but clear proof would be required

that an absolute assignment was intended, and that due notice of the assignment had been given to the lessor.

Where a lessor takes advantage of the law, which puts a premature end to a lease upon the insolvency of the lessee, he is liable, in the absence of any stipulation to the contrary, to the trustee of the lessee's estate for the value of improvements made by such lessee in contemplation of the lease being allowed to run for its full term and to a sub-lessee, to whom the lessee had legally sublet the land before his insolvency and who in contemplation of the lease continuing to its end had made such improvements.

The mere receipt of rent by the lessor after the termination of the lease by effluxion of time, or by the operation of the Insolvent Ordinance, does not constitute a tacit re-location for the full period of the lease.

This was an action for a declaration of rights.

The declaration was in the following terms :

1. The first-named plaintiff is Cradock Parkin, residing at Port Elizabeth; the other plaintiffs are the children of one William Parkin, a brother of the first-named plaintiff, and they reside in the colony of Natal. The first defendant, Edward Lippert, resides in the Transvaal Republic, but he is represented in this colony by the Ægis Assurance and Trust Co. (Limited), of Port Elizabeth, who are duly authorised to accept service of process in this action; the second defendant, George Parkin, resides at Baakens River Farm in the district of Port Elizabeth, and is a brother of the plaintiff, Cradock Parkin. The third, fourth, fifth and sixth defendants are sons of the late John Parkin, jun., who was a brother of the second defendant.

2. On the 27th April, 1852, one John Parkin, sen., then residing at Baaken's River Farm aforesaid, executed his last will and testament in terms of which he bequeathed to his sons, William Parkin, John Parkin, George Parkin, and Cradock Parkin, certain land with buildings thereon, situated in the town of Port Elizabeth, in trust, that they should jointly stand possessed of the same, and during the term of their respective natural lives should be entitled to receive and enjoy equally for their own benefit the annual rents and profits arising therefrom, and immediately upon the decease of one or more of the said sons, the testator

declared that the descendants or lawful issue of such son or sons should come into the place of their deceased parent, and that the share of rent or profit accruing to each such son so dying should thereupon go to and be divided equally among the lawful issue of such son until the ultimate demise of all the said sons, when the said property should devolve absolutely to the respective issue of the said sons who might be then living, and become their joint property in equal shares and proportion, and be transferred to them jointly in free and unencumbered ownership.

3. The said testator, John Parkin, sen., died on the 13th October, 1856, leaving the said will of full force and effect, and leaving the said four sons, one of whom is the first-named plaintiff in this case, another of whom was the father of the other plaintiffs, a third of whom is the second-named defendant, and a fourth of whom was the father of the third, fourth, fifth, and sixth defendants, all him surviving.

4. In terms of the said will the four sons of the testator who have been before mentioned became entitled to the use, benefit, and possession of the said property. The plaintiffs annex hereto and mark with the letter "A" a rough plan showing the position of the said property, and showing certain sub-divisions or blocks thereof, which will be hereinafter referred to.

5. On the 10th February, 1872, the said William Parkin, John Parkin, George Parkin, and Cradock Parkin, hereinafter called the lessors, leased to August Barsdorf, Adèle Lippert, and Ludwig Julius Lippert, then carrying on business in partnership at Port Elizabeth under the style or firm of L. Lippert & Co., certain land and buildings which included that part of the said property which is marked "B" upon the plan hereunto annexed. The said contract of lease, which was in writing, was to continue for a period of seven years, beginning on the 1st January, 1872, and ending on the 31st December, 1878, at a rental of £11 per month, payable monthly. It was specially provided by the said contract that in case the lessees sublet any part of the leased property or assigned the lease to any other person they should remain responsible for the payment of the rent and the fulfilment of the covenants of the lease. The plaintiffs annex hereto a copy of the said lease, marked "B," to which they ask leave to refer this Honourable Court for the further conditions thereof.

6. On the 17th February, 1872, the said lessors let to one James Somers Kirkwood a further portion of the property dealt with by the said will; the said portion is shown by the letters C, D, E, upon the annexed plan. It was agreed in

terms of the written lease then executed by the said parties, and a copy of which, marked "C." is hereunto annexed, that the said lease should endure for the term of the natural lives of all the lessors, at a rental of £31 2s. per quarter, the lessee to be bound within three years from the commencement of the lease to erect upon the property a substantial store of the value of £1,200, in a position approved of by the lessors and to their satisfaction, and all buildings upon the property to be handed up to the owners in good order at the expiration of the lease. It was also specially agreed in terms of the said lease that at the termination of the lease in the last paragraph hereof referred to, the said Kirkwood should have the right to claim a lease of block marked "B" upon the annexed plan upon the same terms and conditions and for the same period as defined in the lease to him of the said blocks C, D, and E.

7. On the 2nd March, 1872, a written agreement was entered into between the said Kirkwood and the partners of the said firm of L. Lippert & Co., constituted as aforesaid, copy of which, marked "D." is hereunto annexed. In terms of the said agreement the said Kirkwood sublet the block marked "C" upon the said plan to L. Lippert & Co., for the whole remaining period of his own lease thereof, and assigned for valuable consideration to the said Lippert & Co., the right secured to him as aforesaid to claim a lease of the block marked "B" after the termination of the original lease thereof to Lippert & Co., upon the conditions in the last preceding paragraph specified. For the further terms of the said agreement the plaintiffs refer this Honourable Court to the said annexure "D."

8. On the 22nd April, 1873, a written agreement, copy of which is hereunto annexed, marked "E," was entered into between the said Kirkwood and the partners of the said firm of L. Lippert & Co. In terms thereof the said Kirkwood sublet to the said Lippert & Co. the block marked "D" upon the annexed plan for the whole remaining period of his own lease thereof; for the further conditions of the said agreement the plaintiffs ask leave to refer this Honourable Court to the terms of the said annexure "E."

9. The lessors were not parties directly or indirectly to either of the said sub-leases, nor did they in any way consent to release the said Kirkwood from the terms of his lease with them, or to accept the said firm of L. Lippert & Co. as lessees under the said lease in his place.

10. The firm of Lippert & Co. entered into possession of block B in February, 1872, and

into possession of blocks C and D after the execution of the respective sub-leases hereinbefore referred to.

11. The estate of the said Kirkwood was sequestrated as insolvent in or about the year 1886. He died in or about the year 1888, and his estate has been wound up.

12. No fresh lease of block B has been entered into between the lessors and the firm of Lippert & Co. since the 31st December, 1878, and no lease at all in respect of blocks C and D.

13. Thereafter the firm of Lippert & Co. was dissolved, and the assets of the said firm were assigned to the defendant Lippert.

14. The defendant Lippert for some years, to wit from the year 1887, or thereabouts, to the year 1892 paid to the lessors rent in respect of the occupation of the said properties at the same rate as fixed by the lease to Lippert & Co. of block B, and by the lease to said Kirkwood of blocks C and D, and he has placed various other persons in occupation of the said blocks, who now purport to hold the same under contract with him. Since the year 1892, the plaintiffs have refused to receive any rent from the said Lippert.

15. The said William Parkin died in or about the year 1885, leaving certain lawful issue who are all majors, and who are plaintiffs in this, suit. The said John Parkin, one of the lessors, died on the 22nd March, 1872, leaving as issue four sons, who are all majors, namely, John Henry Parkin, James Parkin, Robert Charles Parkin, and Herbert Parkin; the said four sons and also George Parkin, another of the lessors, have been joined as co-defendants with the said Lippert in order to secure for all the plaintiffs a declaration of rights from this Honourable Court.

16. The plaintiffs contend that by reason of the insolvency of the said Kirkwood the lease to him of blocks C and D was determined, and that no sub-lease as aforesaid of the said lots between the said Kirkwood and the firm of Lippert & Co. is binding upon the plaintiffs, or upon the other defendants. They also contend that no contract of lease for any defined term exists between them and the defendant Lippert in respect of blocks B, C, and D.

17. The defendant Lippert wrongfully contends that he is entitled during the lives of the plaintiff Cradock Parkin and the defendant George Parkin to continue as lessee to use and occupy the said blocks B, C, and D, and he contends that the lease to the said Kirkwood and the sub-leases to himself are still of full force and effect.

18. On the 28th March, 1894, the plaintiffs gave written notice to the defendant Lippert

that he should give up possession of the said properties blocks B, C, D, and on 30th June, 1894, but the said Lippert wrongfully refuses so to do, and claims to have the right to lease them to the present occupiers.

The plaintiffs claim :

(a) An order declaring that the said lease to the said Kirkwood of blocks C and D has determined, and that the defendant Lippert is not entitled to any rights under his sub-leases from Kirkwood or under the original lease of block B to Lippert & Co.

(b) An order compelling the said Lippert forthwith to deliver possession to them, to be dealt with in terms of the said will, of the said blocks B, C, and D, and all buildings thereon.

(c) Such other relief as to this Honourable Court may seem meet.

(d) Costs of suit against the said Lippert.

For a plea to the declaration, the defendant Edward Lippert says as follows :

1. He admits paragraphs 1 to 8 and paragraphs 10, 11, 13, 15, and 16, save that for the terms and effects of the documents referred to in the declaration he craves leave to refer to the copies annexed thereto. Save as is hereinafter admitted, he denies the allegations in paragraphs 9, 12, 14, 17, and 18.

2. With regard to paragraph 9 he admits that the lessors were not parties directly to the agreements "D" and "E," but he says that they had full knowledge of the same and assented thereto, and consented to release the said Kirkwood from the terms of his lease with them and accept the said firm of Lippert & Co. as lessees in his place.

3. As to paragraph 12 he admits that no other documents of lease between the lessors and the said Lippert & Co. have been executed in respect of the blocks "B," "C" and "D," save those copies whereof are annexed to the declaration.

4. With regard to paragraph 14, he says that from the date of the execution of the said agreements "D" and "E" up to the year 1886 the defendants paid to the said Kirkwood the rents due in respect of blocks "C" and "D" under the said agreements, and the said Kirkwood collected and received the same on behalf of the lessors. Upon the insolvency of the said Kirkwood the said rents were for a time collected and received by the said trustee on behalf of the lessors, and the lessors received the same from the trustee upon the leases then subsisting. In respect of agreement "B," the said rents were paid to the lessors up to the end of the year 1878, and thereafter up to 1886 to the said Kirkwood, who paid over the same to

the lessors. The said rents were paid in 1887 to the said Kirkwood's trustee, who paid over the same to the said lessors.

5. With regard to the said block "B" the defendant says that the said Kirkwood lawfully ceded and assigned to the said Lippert & Co., now represented by the defendant, all his rights under the agreement "C," including the right of the option to hire and take the said block at the expiration of agreement "B," which option the said Lippert & Co. duly exercised, and became entitled to the lease of the said block for the same period for which blocks "C" and "D" are held from the lessors.

6. From the year 1887 to the year 1892 the rents in respect of blocks "E," "C," and "D" were paid to the lessors, and received by them with full knowledge of all the circumstances of the said agreements from the said firm of Lippert & Co., and thereafter from the defendants, who were respectively accepted by the plaintiffs in substitution of the said Kirkwood.

7. He admits that he has placed other persons in occupation of the said blocks, and that the said persons now purport to hold and do hold the same under contract with him. He admits that the plaintiffs have refused to receive rent since 1892, but he says that he duly tendered the said rent to all the lessors, and that it has been accepted by the co-defendants.

8. As to paragraph 17, he admits that he contends that he is entitled to continue as lessee to use and occupy the said blocks "B," "C," and "D" during the lives of the said Cradock and George Parkin, and he says that he is entitled to do so as assignee from the said Kirkwood of all rights under the said leases.

9. As to paragraph 18, he admits the receipt of the notice therein set forth and that he refuses to comply with the terms thereof.

10. He says that buildings have been erected with the knowledge and consent of the lessors upon the said blocks by the said Lippert & Co., of a value far exceeding the value of the buildings stipulated to be erected under the said agreements thereupon, to wit of the value of £4,000.

Wherefore he prays that the plaintiffs' claim may be dismissed with costs.

And for a further plea in case the above plea should prove in-sufficient, but not otherwise, the defendant says :

1. He craves leave to refer to the matters above pleaded.

2. He is entitled to retain possession of the said blocks until the said amount of £4,000 is paid to him in compensation for the buildings erected as aforesaid; but the plaintiffs have

not tendered to pay him the said amount or any portion thereof.

Wherefore he prays that the plaintiffs' claim be dismissed with costs.

Issue was joined on the replication.

Mr. Rose-Innes, Q.C., and Mr. Solomon, Q.C., appeared for the plaintiffs.

Mr. Searle, Q.C., and Mr. Sheil for the defendant Lippert.

Mr. Currey for the defendant Geo. Parkin, to submit to judgment and be saved harmless in costs.

The other defendants were in default.

On 7th June, 1873, an indenture was executed between Cradock Parkin and George Parkin, of the one part, and August Barsdorf, representing the firm of L. Lippert & Co., of the other part, which set forth that, "whereas the parties hereto of the second part are holders of certain leases of several pieces of ground, being portions of the property known as erf No. 7 in Main-street, Port Elizabeth, which leases will expire on the death of the survivor of the said Cradock Parkin, George Parkin, and of their brother William Parkin. And whereas the said parties of the second part have expended large sums of money in buildings erected by them on the said ground, which buildings will at the expiration of the said leases become the property of the owners of the said ground. And whereas the said Cradock Parkin and George Parkin have, at the request of the said firm of L. Lippert & Co., agreed to insure their lives for a sum of £2,500 sterling and to assign the policy of such insurance to the said firm for their own benefit on condition of their paying the premiums and all other expenses of such insurance and assignment. And whereas by an instrument or policy of assurance under the hands of two of the directors of the L.L. and Globe Insurance Co. . . . and bearing date 28th February, 1873, the sum of £2,500 was and is insured to the executors, administrators and assigns of the said Cradock Parkin and George Parkin, payable on the decease of the survivor of them, if such premium as are therein mentioned shall be duly paid at the times therein mentioned, and if the conditions therein expressed and contained shall be duly kept and performed.

Now therefore this indenture witnesseth that in pursuance of the said agreement and in consideration of the interest of the said parties of the second part in the lives of the said Cradock Parkin and George Parkin, and for securing to the said parties of the second part the value of the buildings erected by them as aforesaid they the said Cradock Parkin, and George Parkin have granted assigned, transferred, and set over unto the said firm of L. Lippert

& Co., their executors, administrators and assigns the said recited instrument or policy of assurance and the said sum of £2,500 thereby assured This deed was signed by Cradock and George Parkin, and by August Barsdorf for himself and co-partners, and was sealed and delivered in the presence of William Caldwell Elliott, attorney and notary, of Port Elizabeth, and of his clerk, John Gauntlett Gubb.

The other material facts appear from his lordship's judgment.

Mr. Solomon, Q.C., for the plaintiffs: The facts in the case are common cause. The question at issue is as to the rights of the plaintiffs in respect of blocks "B," "C," and "D." "B" stands on a different footing to "C," and "D." On 31st December, 1878, when the lease of block "B" to Lippert & Co. expired, the firm remained in possession under no contract with the Parkins. It was a mere "holding over," to use an English law term. Kirkwood never exercised the privilege granted to him of taking a lease of block "B."

Since January, 1879, the plaintiffs would have had a good cause of action against Lippert & Co. for the use and occupation of the premises, but the action would be based on occupation not on contract.

As a matter of fact the Parkins received no rent for block "B" after the expiration of the lease in December, 1878. It may be that Lippert & Co. paid Kirkwood, but the latter did not pay the Parkins.

It was only after Kirkwood's insolvency that the trustee paid the Parkins rent in respect of block "B."

The Chief Justice: But did not the leases come to an end at the death of John Parkin? How can a tenant for life let the property beyond the term of his own life. Under the will of old Parkin the sons are merely usufructuaries, and if I construe the will correctly the brothers Parkin had no power to grant a lease of the property, which would last until the death of the survivor.

Mr. Solomon, Q.C.: It has been assumed in the pleadings that the Parkins had that power under the will, and none of the children of the deceased brothers have questioned that power. As to Lippert's holding over there was at most a tacit relocation which can be determined on reasonable notice. *Voet* (19, 2, 9 and 10); *Van Leeuwen, R.D.L.* (Vol. II., p. 172); *Van der Kessel* (Th., 670-671); *Groenewegen ad Cod.* (4, 65, 16); *Victor v. Courlois* (2 Menz. 165); *Woodfall on Landlord and Tenant* (p. 233).

This being so we are entitled to a decree of ejectment with regard to block "B."

Lippert further cannot claim for improvements. Lippert & Co. were lessees when the building was erected, and they cannot keep possession as they claim until the value of the improvements has been paid. *London and South African Exploration Company v. De Beers* (8 Sheil).

The difference between the *bona-fide* possessor and a lessee is that the former holds *pro domino* but the latter does not.

The Chief Justice: Were Lippert & Co. not on the same footing as *bona-fide* possessors? Did they not erect the building in anticipation of Kirkwood exercising the option which he held from the Parkins? Are they not now entitled to compensation?

Mr. Solomon, Q.C.: The Court has never gone so far as to hold that a lessee is entitled to the value of improvements if he builds in anticipation of obtaining a further lease.

With regard to blocks "C" and "D" the agreement entered into between Kirkwood and Lippert & Co., amounted only to a sub-lease, there was no assignment, and consequently no contractual rights arose between the Parkins and Lippert Co. Kirkwood remained liable for the rent. See *De Vries v. Alexander* (Foord, 43). When Kirkwood's leases came to an end the Parkins had the right to eject Lippert & Co. The only scrap of evidence that the Parkins accepted Lippert & Co. as lessees is afforded by the document of 7th June, 1873.

The defence raised in the plea is (paragraph 2) that the Parkins consented to release Kirkwood from the terms of his lease with them and to accept Lippert & Co., as lessees in his place. There is no evidence to support this plea. When did the discharge take place? Was it before or after Kirkwood's insolvency? It must have been before. If so, why was the rent paid to Kirkwood and not to the Parkins direct? It is submitted that there was no delegation with regard to "C" and "D."

On the insolvency of Kirkwood his lease came to an end by virtue of the 104th section of the Ordinance, and his sub-leases to Lippert also came to an end. As to the interpretation of the 104th section, see *De Pass v. Colonial Government* (4 Juta, 383). Under the 23rd section of the English Bankruptcy Act (1889) a trustee may disclaim, and if he does the lease is deemed to be determined and sub-lessees may be ejected. See *Smalley and Another v. Hardinge* (6 Q.B.D., 371).

The Chief Justice: Surely under the 104th section of Ordinance 6 of 1843 the trustee can claim the amount of the ameliorations?

Mr. Solomon, Q.C.: The trustee can be in no better position than the insolvent, and under

the lease all improvements were to revert to the lessors without compensation on the expiration of the lease.

The Chief Justice: Yes, "termination" by the death of the longest living of the Parkin Bros.

Mr. Solomon, Q.C.: Even if that be so Lippert & Co. can only claim the proportion of the improvements erected on block "B." See the judgment of Hopley J. in *Trustees of Lyons and Stone v. London and South African Exploration Company* (6 H.C., 217). But in no event can Lippert & Co., remain in possession as claimed by them. See *De Beers v. London and South African Exploration Company* (8 Sheil, 438).

Mr. Searle, Q.C., for the defendant Lippert: All the equities are in favour of the defendant. As a matter of fact George Parkin is still receiving his share of the rent. He has not been called by the plaintiffs nor has his position been explained.

Cession and assignment stand much upon the same footing. Kirkwood practically assigned his rights to Lippert & Co. Delegation is sufficient without assignment, and of this the document of 7th June, 1873, affords sufficient evidence. Kirkwood was a mere conduit pipe for passing the rents on to the Parkins. Urban tenements are freely assignable. The following cases were cited and discussed; *Green v. Griffiths* (4 Juta, 346); *Fick v. Bierman's Trustees* (2 Juta, 26); *Mills and Sons v. Trustees of Benjamin Bros.* (Buch. 1876, p. 115); *Wright v. Colonial Government* (8 Juta, 269); *Lind and Others v. Calitz and Others* (9 Juta, 269); *Trustees of Dreyer v. Lutley* (3 Juta, 59).

Mr. Solomon, Q.C., replied.

The Court reserved judgment and suggested that an understanding should be arrived at between the parties as to the proportion of the value of the buildings erected on block "C."

It being found impossible to arrive at a satisfactory appraisal the matter was left to the Court to be decided on the evidence.

Afterwards, on 18th June, the defendant Lippert asked leave to put in a claim in re-convention in respect of the improvements effected on block "C."

The application was opposed, but no decision was given on the point until judgment was delivered on the whole case.

Cur. ad vult.

Postea (June 24th).

Judgment was delivered.

The Chief Justice: It has been assumed on both sides that the will of the late John Parkin sen., authorised his four sons to lease the land in question for a period extending till the death of the survivor of them. Upon this assumption

the seven years' lease of lot B in favour of the firm of Lippert, as well as the lease of lots C, D, and E, ending with the death of the survivor of the four sons, in favour of Kirkwood was executed. I do not wish it to be understood that the parties were correct in this assumption, but as my judgment would in the result be the same, whether they were correct or not, I shall not pursue this question any further, except to remark that a life usufructuary has no right to grant a lease extending beyond his own life (Vest, 19, 2, 16). The seven years' lease of lot B was executed on the 10th of February, 1872. One of its conditions was "that any additions or improvements which may be made upon the premises shall be left at the expiration of the said term for the benefit of the proprietors of the said ground, without any compensation or remuneration being paid to the said lessees for the same." On the 17th of February, 1872, the four brothers leased to one Kirkwood lots C, D, and E, of which lot C adjoined lot B. This lease was to terminate with the death of the survivor of the four brothers. One of the covenants was that the lessee should erect a substantial store on the premises of the value of not less than £1,200, and another covenant was, "that he will not remove any buildings . . . which may be erected by him on the said ground, but will keep the said store and all such other buildings . . . as shall be erected by him during his tenancy in good and proper repair, and will at the expiration of this lease, or in case of cancellation thereof, as hereinafter provided, quit and deliver the same to the then proprietors in good and proper repair, without any charge or compensation for the same." The provision as to cancellation was that if the lessee failed to pay the quarterly rent within three months after demand, the lessors should have the option of cancelling the lease. It was further agreed that so soon as the lease of lot B in favour of Lippert should expire, Kirkwood should have the right to hire the same lot upon similar terms to those upon which he held lots C, D, and E. On the 2nd of March, 1872, Kirkwood sublet lot C to Lippert "for and during the whole remaining period of the lease of the said Kirkwood," and ceded and assigned to Lippert the right to hire lot B at the expiration of Lippert's seven years' term. One of the covenants of this sub-lease was that Lippert should erect a substantial store of the value of not less than £1,500, with the understanding that such building might be erected partly on lot B. In 1872 and 1873 Lippert erected a large building extending over the whole of the street frontage of lot B and part of the street frontage of C,

and the present value of that building is admitted to be £3,500. At the beginning of 1879 Lippert's seven years' lease of lot B came to an end, but he seems thereafter to have remained in possession of lot B without obtaining a fresh lease in terms of the right acquired by him from Kirkwood. In 1886 Kirkwood became insolvent. Until that time the rent for lots C and D had been paid to him, and after that time Lippert continued to pay it to the trustee. As to the rent for lot B, Lippert paid it to the Parkins until 1879. After that date he paid the rent, at the same rate at which Kirkwood was to obtain his lease, to Kirkwood. Upon Kirkwood's insolvency the rent was paid to his trustee. In 1888 the trustee refused any longer to receive the rent, and from that date until 1892 Lippert paid the rent on all the lots directly to the then surviving brothers Parkin. The right of the defendant Lippert to the occupation of those lots was not challenged until the year 1892, but from that year the plaintiffs refused to accept any further rent from Lippert. The object of the present action is to eject Lippert from lots B, C, and D. The defence is that Lippert is the assignee of all Kirkwood's rights, and has been accepted as such by the plaintiffs, and that, even if he is not entitled to retain occupation as such assignee, he cannot be ejected without payment to him of compensation for improvements upon lots B and C to the extent to which the value of the land has been enhanced. Of the four brothers Parkin who executed the two leases, two brothers, viz., Cradock and George, survive. Cradock is one of the plaintiffs, and George has been made co-defendant with Lippert. John Parkin, jun., one of the brothers, died on the 22nd of March, 1872, and his sons have been joined as co-defendants. The other brother, William Parkin, died in 1885, and his sons are co-plaintiffs with Cradock Parkin. It is admitted on the defendants' behalf, that if Kirkwood had not executed the sub-lease his insolvency in 1886 would have put an end to the lease of lots C, D and E. As to lot B, he never obtained a lease of it from the Parkins, and therefore, *a fortiori*, his right to obtain such a lease terminated with his insolvency. But the defendant's contention is that before Kirkwood's insolvency he had effected a complete assignment of his lease and of all his rights thereunder to Lippert, and that, therefore, such insolvency could not prejudice Lippert's rights under that assignment. The Court has had occasion in more than one case to point out that the cession or assignment of a lessee's rights stands on a somewhat different footing from the cession of a simple right of action,

The lessee not only enjoys rights as against the lessor, but he owes him obligations, the most important of which is that of paying the stipulated rent. On principle, therefore, the assignment of a lease ought not to carry with it the substitution of the assignee for the lessee as the person liable to pay the rent, unless the lessor has consented to the delegation. In regard, however, to urban tenements it has always been the practice of this Court to regard a lease of such tenements as a contract with the assignees of the lessee as well as with the lessee himself and not to regard the lessor's consent as necessary to the validity of the assignment. The consequence has been that if once a complete assignment has been clearly established the Court has held that such assignment carried with it a delegation of the assignee as liable for the rent in lieu of the lessee. In the case of a sub-lease, however, the original lessor cannot claim rent from the sub-lessee (*Voet*, 19, 2, 21), for unless there has been a complete assignment of the lease no privity of contract arises between them by virtue of the assignability of the lease. In every case, therefore, in which an assignment has been relied upon, the Court has insisted upon strict proof that an absolute assignment and not a mere sub-lease was intended (see, for instance, *Green v. Griffiths*, 4 Juta, 346, and *De Pass v. Government*, 4 Juta, 383), and the Court has never dispensed with the necessity of due notice of such assignment being given to the lessor. In the present case the contract between Kirkwood and Lippert amounts to a sub-lease, and not to an assignment of the lease. The rent is made payable to Kirkwood and not to the lessors, and the terms upon which a store is to be constructed by Lippert are different from those in the original lease, under which a store was to be constructed by Kirkwood. As to lot B, the arrangement was that Kirkwood was to obtain a lease from the owners and assign it to Lippert. No such lease of lot B was ever obtained by Kirkwood, and consequently there could be no assignment of such lease. Upon the insolvency of Kirkwood the lease to which he remained entitled came to an end in terms of the 104th section, and with it the sub-lease also came to an end. It is quite true that the then survivors of the brothers Parkin appear to have considered that the lease remained in force, and in that belief continued for some years more to receive rent from Lippert, but the receipt by them of rent under the circumstances disclosed in evidence does not amount to a tacit relocation of the land to Lippert for the full period of Kirkwood's lease. As has been justly remarked by *Voet* (19, 2, 16), a tacit relocation depends entirely upon the

consent of the owner as inferred from his conduct, and therefore such consent cannot be entertained beyond the necessary consequences to be deduced from his conduct. In the absence of any contract, express or implied, under which the defendant Lippert is entitled to remain in occupation of the land, I am of opinion that he was bound, after due notice from the owners, to quit possession of the land. The questions next arise whether Lippert is entitled to compensation for improvements, and, if he is so entitled, whether he may remain in occupation until such compensation has been paid or tendered. As to lot B, I am clearly of opinion that he cannot claim compensation for the part of the store erected on that lot. The store was built at the latest in 1873, and therefore long before his own seven years' lease had come to an end. By that lease he was expressly debarred from claiming compensation for any improvements left by him on the premises. Upon the expiration of the seven years the owners of the land became the owners of the building, and the fact that Lippert built in the belief that, under his sub-lease, he would keep lot B until the death of the surviving brother Parkin cannot deprive the owners of the land of their rights under their contract with Lippert. In regard to lot C, however, the lease of that lot has not been allowed to run for its full period. Before the expiration of that period some of the owners seek to eject the sub-lessee on the ground that he has no right of occupation under his sub-lease, because the lease itself has been terminated by the lessee's insolvency. They would I apprehend, have been entitled to eject the trustee of Kirkwood's estate if he had insisted upon remaining in occupation but would the trustee have been entitled to claim compensation for improvements, if any, made by the insolvent? The subject of improvements made by lessees and other occupiers of land was fully discussed by this Court in *De Beers Consolidated Mines v. London and South African Exploration Company* (10 Juta, 359). Among the conclusions there arrived at were the following: "In the absence of special agreement, a lessee annexing materials, not being growing trees, to the soil, is presumed to do so for the sake of temporary and not perpetual use, and as between himself and the owner of the land, does not during his tenancy lose his ownership in the materials. . . . At the expiration of the lease, however, the owner of the land becomes the owner of all materials then remaining annexed. . . . The lessee has no right of retention after the expiration of his term, but may by action recover the value of the materials annexed by him with the landlord's

consent." In confirming the judgment in that case, the judges of the Judicial Committee remarked that "their lordships saw no reason to think that the conclusions at which the Supreme Court arrived were in any respect erroneous." We have now to deal with a case in which a lease has come to an end by operation of a special law and not by effluxion of a time. If the Insolvent Ordinance had been silent as to the right of a trustee of an insolvent lessee's estate to claim the value of improvements made by such lessee in contemplation of the lease running for the stipulated period I certainly incline to the view that compensation would have been claimable. The presumption against forfeiture of property in any shape or form lies at the root of the well-known maxim of our law that no one shall be enriched at the expense of another. It does not follow that because the Legislature has enacted that insolvency shall terminate a lease it likewise intended to make a free gift to the lessor of all improvements made by the lessee at a time when he honestly believed that he would have the full enjoyment of those improvements to the end of his term. A lessee's insolvency might have been occasioned by the expense of valuable buildings erected at the commencement of the term of a long lease. In such a case it would be difficult to hold that the Legislature intended not only to put an end to the lease, but to give the lessor the benefit, at the expense of the creditors, of the highly-increased rent derivable from the valuable buildings. To prevent the possibility of such a construction being placed upon the enacting portion of the 104th section of the Insolvent Ordinance, one of the provisos was inserted: "Provided that nothing herein contained shall . . . prevent the trustee from suing the lessor or person having made such agreement in any competent court for the amount of any ameliorations made on the subject, and in contemplation of such lease or agreement by the insolvent prior to the surrender or adjudication of sequestration of his estate, or to deprive such lessor or person of his legal defence against such suit." Then follows the further proviso that it shall be lawful for the lessor when sued for the amount of such ameliorations to offer to receive the trustee as lessee in the place of the insolvent for the full period of the stipulated endurance of such lease. This proviso removes any hardship which might result from the trustee's claim for remuneration. The claim may immediately be averted by allowing the trustee to remain as tenant. In the case of *Trustee of Lyons & Stone v. South African Exploration Company* (6 H.C., 217), the High Court of Griqualand held that section 104 of the Insolvent Ordinance

gives no further rights to the trustee than the lessee would have had if the lease had ceased through effluxion of time. The majority of the Court appeared to have considered that because a lessee is not entitled at the expiration of his term to compensation for improvements, he cannot legally claim such compensation if the term is prematurely ended by operation of law. But the principle upon which compensation is claimable in the latter case is that, unless it were allowed, the lessee would not have the benefit of improvements which he made in contemplation, not of an abrupt termination by the operation of a special law, but of the lease running to its end. There is no difference in principle, although there may be in degree, between such a case and that of a *bona-fide* possessor making improvements in the belief that he will have the permanent enjoyment of them. In one sense it may be said to be an insolvent's own fault that he has become insolvent, but if the trustee is willing to take over the insolvent's obligations as lessee, the lessor does not necessarily suffer from the fact of such insolvency. On grounds of general policy, the Legislature has intervened by cancelling every lease upon the insolvency of the lessee, but in doing so it reserved the rights of creditors to the value of the improvements made by the lessee. While concurring generally with the views of Hopley, J., who differed from the rest of the Court in the case just cited, I cannot agree with him that the trustee is limited to the estimated value of the improvements for the unexpired portion of the lease. The "amount of the ameliorations," in my opinion, means no more or less than the amount representing the enhanced value of the land by reason of such ameliorations. In the present case the improvements were made by the sub-lessee, whom the owners seek to eject because of the termination of the lease before the time stipulated in the lease and sub-lease. In principle there appears to me to be no difference between a lessee and a sub-lessee, in regard to the improvements made by either. The right of the lessee to be compensated by the person taking the fruit of his expense or labour before the time contemplated by both is based not upon the privity of contract between them but upon the equitable principles which I have already explained. Those principles are equally applicable to the case of a sub-lessee who has effected improvements in the justifiable belief that he would enjoy them for a certain period and is prematurely ejected from the property, not because of any breach of the covenants on his part or on the part of the lessee himself but by virtue of a

statute which, by cancelling the lease, puts an abrupt end also to the sub-lease. There is no question in this case, as there was in *Colonial Government v. Smith and Others* (4 Juta, 194), whether the plaintiffs might not, if the defendants' claim be allowed, have to pay the same sum twice over, for the trustees of Kirkwood's estate make no claim for compensation. In respect of lot C, therefore, I am of opinion that the defendant Lippert is entitled to compensation to the extent to which he has enhanced the value of the land by his improvements. The only question which remains is whether the defendant Lippert is entitled to retain possession of lot C until the compensation is paid or tendered, or whether he must surrender the land and sue for compensation. There is much to be said in favour of the view that the lessee or sub-lessee, whose tenancy is terminated without his own default in observing the covenants of the lease, stands on the same footing as the *bona-fide* possessor. On the other hand, the 104th section of the Insolvent Ordinance would seem to indicate that a lessee must surrender the land, and sue for the amount of his improvements. The sub-lessee, whose title is derived from that of the lessee, cannot have greater rights than the latter.

Mr. Rose-Innes, Q.C.: As to costs, plaintiff is successful in every point raised in his pleadings, while it is only after full argument that the defendants applied to put in the claim in reconvention now admitted by the Court.

Court: But defendants were in a very doubtful position, it was not at all clear what their rights were.

Mr. Innes: But we won, and should not lose our undoubted right. The practice is in any case to give plaintiffs their costs in convention and defendants theirs as plaintiffs in reconvention, and the Court should determine what are the respective costs to be assigned. Besides there is no evidence as to the value of lot C. If the Court allows the claim in reconvention and refers for valuation to someone in Port Elizabeth, this is quite a new point; no evidence was led on it.

Court: We understood the parties were coming to an understanding on this.

Mr. Searle, Q.C.: We were willing to leave it to the Court. Besides, the Court has the widest discretion. The plaintiffs have been lying by all the time allowing us to erect buildings, which would not have been done unless Kirkwood had given full rights to do so. Even if they succeed they have no equity in their favour. Lippert & Co. acted *bona fide* right through the whole transaction.

The Chief Justice said: Upon the whole we are of opinion that the claim in reconvention ought not to be allowed. The defendants had ample opportunity before the arguments were concluded to make such a claim, but they insisted upon their right of retention. They went to trial upon that issue, and upon the whole we have come to the conclusion that the sub-lessee has not the right of retention. The insolvency put an end to the lease, and the lease going the sub-lessee must go also, and if he has a claim for improvements he must bring an action. If he does bring such an action, perhaps the known opinion of the Court that compensation is payable in respect to lot C may prevent litigation. The plaintiffs have succeeded in their action, and the ordinary rule is that they must have their costs. On the whole, therefore, I am of opinion that the plaintiffs are entitled to judgment as prayed, with costs against Lippert. The remaining defendants must pay their own costs.

Mr. Innes applied for Cradock Parkin's expenses as a witness.

The Court refused to grant those expenses.

Subsequently on 26th June, an application was made for George Parkin's costs and was refused.

[Plaintiffs' Attorneys, Messrs. Van Zyl & Buissinné; Lippert's Attorneys, Messrs. Scanlen & Syfret; George Parkin's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

QUEEN V. VAN ROOYEN. { 1895.
May 31st

Mr. Justice Upington said: The case of the *Queen v. Van Rooyen* has come before me as judge of the week. In this case there has been a great deal of irregularity. The boy Van Rooyen is aged thirteen, and was apprenticed by his mother to a farmer. He declined to go to his work, and appears in fact to have been a rather disobedient youth. The mother and the farmer brought the boy to the Resident Magistrate of Ceres, and the Resident Magistrate took evidence as to what had taken place, but did not formally charge the accused at all, and in fact he says in his letter to me he did not look upon it as being a case in which he was acting as a magistrate, but rather at the request of the mother, directed the boy to be chastised. No plea was taken, no judgment entered, and sentence was given that the boy was to receive fifteen cuts. The whole of the evidence shows the probability that the boy was properly punished, but at the same time the proceedings of the Resident Magistrate have been wholly irregular and illegal. The conviction should not stand on record against the boy, and it must be quashed.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

Re INSOLVENT ESTATE OF EDMUND BOND. { 1895.
June 4th.

Mr. Maskew applied for the appointment of a provisional trustee in the insolvent estate of Edmund Bond, a butcher, residing at Queen's Town, and suggested Mr. W. C. B. Price.

Order granted, leave being given to the provisional trustee to carry on the business.

SIMONS v. SIMONS. { 1895.
June 4th.

This was an action for judicial separation, instituted by Mrs. Simons against her husband, on the grounds of his cruelty and ill-treatment.

Mr. Graham for the plaintiff.

Mr. Benjamin for the defendant.

The plaintiff, Margaret Ellen Simons, deposed that she was married at Kimberley in April, 1881. Her husband never in his life treated her kindly. He ill-treated her three days after the marriage. She was supported by Peach & Co. in keeping a Kafir store at Du Toit's Pan. Her husband did not work then. He was intemperate in his habits. She supported her children and her husband for some years; he did not work and was always addicted to drink. Her arm was permanently injured and useless owing to her husband's violence eighteen months ago. Subsequently he broke two of her ribs. He had on many occasions promised to stop drinking, and on a further promise to that effect she took over the management of the Commercial Hotel in Grave-street, and was still there. Her husband, however, continued drinking and kept customers away. She had left him twice this year and returned, but he persisted in his ill-treatment. He gave her a black eye and otherwise injured her. He signed a document before his solicitors, acknowledging his bad behaviour, and promising to reform in consideration of her staying legal proceedings against him. On that she went back to him, but eight days afterwards (early in April last) he got drunk and beat her behind the bar, before many people, and that night he put her out of the house. The last time he assaulted her was on the 24th April. Received letters (handed into court) from her husband, written from Somerset West in April. Had never given him cause for his ill-treatment. She had never been addicted to intem-

perate habits. He often used very bad language in the presence of the children. There had been nine children, but only four were living. The children had been returned to her from school that morning, because she could not pay the fees. She claimed the custody of the children, believing that she could support them better than he could.

Cross-examined : At the time of her marriage she was in service as a housemaid. She was not an illiterate woman. After the marriage she and her husband went through the country trading. In 1890 she took over the Cambrian Hotel, being very "hard up" at the time. Mr. Simons did not pay for the hotel; Mosenthal & Co. supported her in the venture. £100 was paid down, but that was the proceeds of a sale of her jewellery and furniture. She had supported her husband and children ever since the marriage. He might have given her a £5 note occasionally. She used to be in the bar from seven o'clock in the morning till nine o'clock at night. Was never intoxicated at the Cambrian Hotel. About two years ago her husband, having involved her in debt, left with a cart and horses (which cost £130) for the Rand; sold the cart and horses, and then wrote for a remittance to bring him down. In consequence of all this she had to assign her estate, and her creditors sold her up. In 1893 she was very hard up, and managed the Melbourne bar for Mr. Bisset. She was not drunk on the first day she went to the Melbourne, but her husband was. She did not cause the injury to her arm by pushing it through a window on that occasion. She was never intoxicated in her life. When she first came to Cape Town she lived at Amos's. She and her husband then went to Port Elizabeth, and stayed at a hotel; on one occasion her husband locked her up all day. She was not familiar with strangers there, drinking with them, but her husband, on the other hand, took a strange woman to the Promenade Concert. On their return to Cape Town they went on board the Athenian. On that occasion her husband was drunk and assaulted her, breaking two of her ribs. Her husband left her with her dead child lying beside her in bed and went out with a Miss Ashley. On the 1st and 3rd April last her husband struck her, but she gave him no reason for doing so. His conduct was nearly murderous and she left him. She was not then visited by Gray, the billiard-marker. Mrs. Johnson, with whom her husband was at present keeping company, visited her, but did not endeavour to persuade her to return to her husband. A gentleman was in her room at the time persuading her to return to her husband. On April 18, she with a party, including Mr.

Rowan, drunk a bottle of champagne; she did not embrace Mr. Rowan on that occasion. Mrs. Rowan was present. Nor did she afterwards go into the billiard-room in an intoxicated condition. She often played billiards. There was a rumour that day that her husband had committed suicide. She said she didn't believe that her husband had the pluck to commit suicide, and that the rumour was not true. She had not many admirers at the hotel; she had to be very civil behind the bar to all customers, or there would be no trade. Gray was not now in employment at the hotel, but he frequently visited the hotel, and always paid for what he had. There was a Mr. Swan and a Mr. Fleming staying at the hotel. There was a charge made against Fleming that he had stolen a diamond pin; Fleming afterwards admitted he had stolen it. Did not reckon Fleming as a friend. At one time she was not sharp tempered, but her husband was enough to sour anybody. She slapped him across the face once; that was because he was drinking champagne with a Mrs. Johnson, to whom she objected. She had always been a good wife to him. Her children were thirteen, eleven, eight, and four years of age. Three days after the marriage he struck her. He struck her even before the marriage. Had sold her jewellery to pay some debts.

Re-examined: Her husband had never charged her with unfaithfulness, nor with anything touched upon in the cross-examination. Her husband had never in his life given her money to live on. He himself received an allowance from England, but he never showed her the letters of remittance.

By the Court: Her husband wrote her very affectionate letters from Somerset West in April last, stating that he was trying to cure himself of his drinking habits. She lived with him after the Somerset West visit, and he assaulted her again.

Leopold Morton deposed that he was engaged at the Commercial Hotel. After Mr. Simons came back from Somerset West he was not sober once during eight days. He was drunk and used disgusting language, and struck his wife. Mr. Simons did not do any work at the hotel: his wife did it all. Mr. Simons, however, used to walk about the hotel as if it belonged to him.

Cross-examined: The defendant was always drunk, even in the morning. On one occasion he interfered to prevent him from striking his wife.

Arthur John Matthews said he was a servant at the Commercial, and left in April. Mr.

Simons was the worse for liquor on many occasions. Had never actually seen him strike his wife, but he remembered that on one occasion she cried out "Murder." Witness found her with her eye cut and in a very frightened condition, with her husband standing near. Had never seen Mrs. Simons the worse for liquor. Defendant once admitted to witness that he had been very cruel to his wife, and that she was a good woman and had never given him cause for his ill-treatment.

Cross-examined: Was at present a waiter at the Palmerston Hotel. Mr. Simons was a very jealous husband, but he (witness) had never seen Mrs. Simons give any cause for jealousy.

Charles Rowan said he had been staying at the Commercial with his wife and family. Had never seen either Mr. Simons or Mrs. Simons the worse for liquor. It was utterly untrue that Mrs. Simons embraced him; his wife was present on the alleged occasion. Mr. Simons ill-used his wife on one occasion and witness expostulated with him.

Cecil Gray deposed that he was billiard-marker at the Commercial. Frequently saw Simons ill-treat his wife. Had never been guilty of misconduct with Mrs. Simons.

Cross-examined: Mrs. Simons left the hotel in consequence of her husband's ill-treatment. Did not know that Mr. Simons had expostulated with his wife about any undue familiarity with witness.

This closed the case for the plaintiff.

Mr. Steytler deposed that he was appointed by order of the Court to supervise the Commercial Hotel, and Mrs. Simons had accordingly paid him moneys received in the business.

By Mr. Graham: There was a great falling off in the business, and he had no reason to believe that any money was being kept back.

Harry Stokes Hamilton Simons, the defendant, deposed that he was originally a bank clerk in London. He admitted that he was addicted to drinking habits, but so was his wife. He had had occasion many times to remonstrate with his wife as to her conduct with men.

His Lordship said that the terms of the deed of separation drawn up seemed very fair on the plaintiff's own evidence. It was only a question of costs.

At this stage counsel agreed to accept the terms, subject to certain amendments, each party to pay their own costs, and judgment was given accordingly, his lordship the Chief Justice remarking that it was to be regretted that the plaintiff did not accept the terms in the first instance, instead of having domestic quarrels exposed to the public.

[Plaintiffs' Attorneys, Messrs. Fairbridge, Arden & Lawton; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

BREEDLE AND CO. V. MCLEOD.

Mr. Close applied on behalf of the defendant for leave to sign judgment with costs.

The Court granted the order as prayed.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

KOCK V. ZACKON.

{ 1895.
June 6th.

Interpleader suit—Further evidence—
Appeal.

Case remitted for further evidence as to ownership of property declared executable in an interpleader suit.

This was an appeal from a judgment of the Resident Magistrate of Van Rhyn's Dorp in an interpleader suit, in which the present appellant, claimant in the Court below, claimed as his property a certain ox, which had been attached by the respondent in execution of a judgment obtained by him against one August Koopman.

Only two witnesses were called, the claimant and his brother, and from their evidence it appeared that in September, 1891, there was an auction held at Ronderug by one Schreuder, when Koopman (who is employed as a herd by the claimant and his father, on whose ground he has lived for ten or twelve years, receiving as pay certain wages per month and also land and seed) purchased goods to the amount of £2 4s. 6d.

That in February, 1892, Koopman was called upon to pay the amount, and, as he had not the money, he came to Kock and asked him to buy the ox in question and pay the amount to Schreuder. Kock took delivery of the ox, and paid Schreuder's account.

Kock further stated that Koopman had cattle of his own which run on his (Kock's) farm, and that the ox which was sold was one of them, and that he did not mark the ox with his mark after he had bought it from Koopman, whose mark it bears at present.

The Resident Magistrate declared the ox executable, the following being his reasons:

1. The evidence of Kock was of a most unsatisfactory nature, the man positively not knowing how many head of cattle he and his brother possessed. It was not until I had repeatedly put the question as to how many head of horned cattle he and the others owned that he arrived at the approximate number of about 100.

2. That the cattle of August Koopman and that of the Kocks ran together on the farm Kuilen, Koopman being ostensibly their herd. As a matter of fact, the Kocks pay little, if any, attention to the farm or cattle.

3. That being firmly of opinion that the claim to the ox in question was purely an afterthought, which arose subsequent to the judgment delivered in the case *Zackon v. Koopman*, I adjudged the ox in question executable.

4. That notwithstanding the fact that the said ox was more than three years (as alleged by Kock) in his possession, and that the Brands Registration Act is in force in this district, Kock failed to place his mark on the animal, and allowed the animal to run with and remain amongst the cattle of August Koopman.

5. Further, that the case in question is only one of a number of interpleaders which have arisen during Zackon's action in summoning Koopman.

6. That the evidence of August Christoffel Kock was, in my opinion, purely and simply interested, and not worthy of credence.

From this judgment the claimant now appealed.

Mr. Graham was heard in support of the appeal.

Mr. Juta, Q.C., for the respondent.

The case was remitted to the Magistrate for further evidence.

The Chief Justice said: At this stage we cannot express an opinion as to whether the ox belongs to the plaintiff or not; but we can not lose sight altogether of our knowledge of what occurred at the time of the trial. Application was made to this Court a few weeks ago by the appellant for leave to take further evidence on the ground that the Magistrate had refused to allow the plaintiff to produce any more witnesses. The Court refused to allow that application for the simple reason that we were bound by the record. There was a conflict in the evidence as to what took place at the trial, and we preferred to abide by the record, and inasmuch as the record did not show that there was a tender of further evidence by the appellant the Court refused the application. It is different now that the case comes before us on appeal. If we know now that the plaintiff had

more witnesses whom he could call to support his view we ought not to refuse to give him an opportunity of calling those witnesses. If the evidence of the two witnesses for the plaintiff is to be believed, the ox in question is the claimant's property; but the Magistrate said in effect, "I refused to believe them." There are suspicious circumstances in their evidence, but at the same time those circumstances are not conclusive, and I do not feel that I am in a position to do justice between these two parties without hearing all the evidence that can be obtained. It may be that at the subsequent trial we should support the view of the defendant that the ox does not belong to the claimant, but at the present full justice can not be done without giving both parties ample opportunity for producing further evidence. The case will, therefore, be remitted to the Resident Magistrate of Van Rhyn's Dorp for the purpose of taking the evidence of such further witnesses as may be produced both by the claimant and by the defendant.

The question of costs will stand over.

Mr. Justice Upington concurred.

[Appellant's Attorney, W. E. Moore; Respondent's Attorney, G. Montgomery-Walker.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

EATONS, ROBINS AND CO. V. { 1895.
FOUCHER. { June 16th.

Mr. Buchanan moved for the final adjudication of the defendant's estate.—Order granted.

SOUTH AFRICAN ASSOCIATION V. HONEY.

Mr. Maskew applied for provisional sentence on a cheque for £8 16s., with interest from January 28 last.—Granted.

LOTRIET'S EXECUTRIX V. SNYMAN.

Mr. Maskew applied for provisional sentence on an acknowledgment of debt for £100, with interest at the rate of 6 per cent. per annum from May 25, 1892, less £70 paid on account.—Granted.

W. GOURLAY AND CO. V. H. S. H. SIMONS.

Mr. Close applied for the final adjudication of the defendant's estate.

The Chief Justice pointed out that on Tuesday defendant filed an affidavit in opposition.

Counsel said that defendant had authorised his attorneys to withdraw the opposition.

Application granted.

STANDARD BANK V. G. HAY.

Mr. Molteno applied for the final adjudication of the defendant's estate.

Granted.

PRINS V. ROUX,

Mr. Molteno applied for provisional sentence for the costs, the amount due having been paid. Judgment for costs given.

HOLLINGHURST V. FRAME AND CO.

Mr. Tredgold applied for judgment for £97 10s., in terms of consent filed.

Granted.

REHABILITATIONS.

On motion from the Bar, the following insolvents were rehabilitated: Johannes Jacobus Preiss, Carel Albrecht de Villiers, O.T.son, George Norman Price (discharge under the 117th section of the Ordinance).

IN THE MATTER OF THE MINORS DREW.

Mr. Juta, Q.C., applied for authority to the guardian of two of the said minors to take them to England and place them in charge of relatives who are able and willing to provide for their future, and for leave to pay the expenses of the journey out of the funds of the estate of the deceased parents of the minors.

Granted; costs of the application to come out of the share of the two children.

THE PETITION OF ELEANOR { 1895.
MARGARET HALL. { June 12th.

Mr. Close applied for authority to the Registrar of Deeds to cancel certain mortgage bond for £1,200 passed by the petitioner's father, hypothecating certain lot of ground marked No. 11, in the town of Uitenhage, subsequently donated to petitioner, no steps having been taken by the trustees of the insolvent estate of the bondholder to recover the same.

The hearing of the case was postponed until July 12, with leave for it to be mentioned on

June 24 if desired, notice meanwhile to be given to the trustee and to the executors of Kirk of the intention to apply for the cancellation of the bond, and for further information to be obtained as to what has become of the bond.

IN THE ESTATE OF THE LATE JOHN TROLLIP.

Mr. Close applied for an order authorising the transfer to the purchaser of certain lot of ground, being part of No. 2, in Dundas-street, Cradock, the same having been sold at a good price by the executors, and all the major heirs having agreed thereto, the consent on behalf of one minor heir being required.

Order granted.

FERREIRA V. DU PLESSIS.

This was an application for an order setting aside the authority granted on the 28th of February last to the sheriff to transfer to respondent certain portion of the farm Rietfontein, in the district of Humansdorp, on the ground that petitioner's signature was obtained by fraudulent representations, and that time be granted to petitioner to institute an action for a declaration of rights.

Mr. McLachlan appeared for the applicant.

Mr. Benjamin appeared for respondent.

The Chief Justice said: I have listened very patiently to this case, because if there has been this gross fraud committed the applicant is entitled to relief, even if the amount is small. But no *prima-facie* case has been made, there have been two successive judgments in this Court, and in neither of them was this defence raised at all. It is stated that in both cases the agent employed by the applicant did not obey his instructions, but acted contrary to them. These are very serious charges against those agents, and in the face of the judgments given a good deal stronger proof is required than that given by the applicant. If the applicant can prove his allegations he will succeed in setting aside the previous proceedings and in recovering the costs in this motion. For the present there is no *prima-facie* case made out, and this application must be refused with costs.

Mr. Justice Upington: It would be highly dangerous upon such evidence as given here to set aside the previous proceedings of the Court.

IN THE ESTATE OF THE LATE JOHAN G. KILIAN.

Mr. Maskew applied for an order authorising the Master of the Supreme Court to issue letters of administration to Ludwig F. Kilian, one of

the executors and heirs appointed by the will, but incorrectly described therein as Ferdinand Ludwig Kilian.

Granted.

IN THE ESTATE OF THE LATE JACOBUS P. HERMAN.

Mr. Molteno applied for an order authorising the Registrar of Deeds to cancel certain entry in the Debt Registry whereby certain lot of land marked No. 5 in Sir Lowry-street is mortgaged for £25 in favour of the trustees of the South African Bank, by the said Jacobus P. Herman, the bond not being able to be found, and all claims due to the bank having been satisfied.—Order granted.

THE PETITION OF JACOMINA C. CLASSEN.

Mr. Close applied, on behalf of petitioner, for leave to sue *in forma pauperis* in an action against her husband for divorce by reason of his alleged adultery.—The application was granted

IN THE MATTER OF JOHN WALKER WHITE, AN ALLEGED LUNATIC.

Mr. Close applied for an order declaring the said White to be of unsound mind, and placing his estate under curatorship, and providing for the custody of the minor children.

The Court authorised applicant to issue a summons, returnable on June 18, to have White declared of unsound mind and for a curator to be appointed. The summons to be served upon the alleged lunatic as well as upon the Attorney-General, the *en officio curator ad litem*.

WHIPP V. WHIPP.*

{ 1895.
June 12th.

Husband and wife — Edictal citation — Restitution of conjugal rights—Domicile—Jurisdiction.

Application by a wife to sue her husband by edictal citation for restitution of conjugal rights refused on the ground that neither the husband nor the wife had ever been domiciled here and the marriage had been contracted elsewhere.

This was the petition of Katherine Florence Whipp (born Bright), at present of Charlton House, Mowbray, Cape Division.

The petitioner alleged that she was married to

* No authorities were cited in this case, but see *Mason v. Mason* (4 E.D.C. 330) and *Burnett v. Burnett* (12 C.L.L. 147).—ED.

her husband at Heidelberg in the South African Republic on 28th September, 1892, and that there was issue of the marriage one son, aged two years.

That immediately after her marriage she moved to Pretoria, where she resided with her husband until November, 1893, when she came to the Cape on a visit to her mother for a period of five months with the full knowledge and consent of her husband.

That shortly afterwards she returned to Pretoria, and thereafter her child took ill and she was ordered by her medical attendant to take him away to Potchefstroom or elsewhere for a change.

That while at Potchefstroom for a period of six weeks she had only one letter from her husband, being a reply to one from her in which she informed him that there was an appointment vacant there for which he should apply. He replied that he had no desire to reside at Potchefstroom.

Thereafter at the request of her husband's relations she went to Charlestown in Natal, the relations residing there providing her with fund for the journey. She wrote to her husband that she intended visiting Natal and he raised no objection.

That before terminating her stay at Charlestown she again wrote to her husband informing him that she wished either to rejoin him at Pretoria, or suggested his joining her at Charlestown.

He replied that he had no funds. She thereupon realised a diamond ring and sent him the money. He utilised the money for his own purposes, and wrote in reply that he had grown tired of her and did not care about seeing her again.

The petitioner alleged that she had repeatedly urged her husband to take her back, but that he refused to do so.

The prayer was for an order authorising the petitioner to sue her husband by edict for restitution of conjugal rights, failing which, for divorce.

Mr. Benjamin moved.

The Court made no order.

The Chief Justice said: Before the Court grants leave to sue a defendant by edictal citation there must at all events be some *prima-facie* proof of jurisdiction. In actions for restitution of conjugal rights or for divorce the fact that the husband had brought and left his wife here has been accepted as presumptive evidence of his intention to fix his domicile in this colony. The Court is now asked to exercise jurisdiction in a case where no such presumption can possibly arise. A suit is instituted by

a wife who has never been resident here against a husband who, for all we know, may never even have been here. According to the petition they lived together in the Transvaal, then the wife came here for her health, next she went to Charlestown for her health, and subsequently she returned to her husband in the Transvaal. The petition does not even state what induced her to come back to the Cape, if indeed she is here at all, and yet this Court is asked to assist her in compelling her husband to come and live with her.

The proper Court for granting this relief is the Transvaal Court, within whose jurisdiction the defendant resides and has always resided. It is unnecessary to inquire whether this Court would have been justified in assuming jurisdiction if the plaintiff had exchanged her Transvaal domicile for a domicile in this colony. The suit for restitution would not decide her *status* if the husband obeyed the decree for restitution by coming to his wife's new domicile and there living with her. But whatever the decision would have been in a suit brought by a wife resident here, I am clearly of opinion that edictal citation ought not to issue at the suit of a non-resident wife against a non-resident husband in respect of a marriage which was not contracted in this colony and that the application must be refused.

Mr. Justice Upington concurred.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice).]

WHELAN V. WHITE. } 1895.
June 18th.

Lunatic—Summons—Cost of maintenance—
Magistrate's duty in granting a reception
order under Act 35 of 1891.

Where proceedings are taken against an alleged lunatic under detention to have him declared of unsound mind the summons should contain a specific allegation as to the previous judicial order under which he is detained.

The Court, on being satisfied that a lunatic had property, ordered his curator bonis to contribute a certain sum per month out of

the lunatic's funds towards his maintenance while under detention in a Government lunatic asylum.

Before a Magistrate grants a detention order under Act 35 of 1891 he should inquire into the means of the alleged lunatic for the information of the Court or Judge before whom proceedings are subsequently taken.

This was the hearing of a summons addressed to the defendant (at present confined in the Robben Island Lunatic Asylum under a judge's order), calling upon him to show cause why he should not be adjudged incapable of managing his affairs, and why the plaintiff should not be appointed curator of his person and property and guardian of his minor children.

Mr. Close appeared for the plaintiff.

Mr. Schreiner, Q.C. (Attorney-General), who appeared as official *curator ad litem*, took exception to the form of the summons, and urged that in this and similar cases the summons should contain a specific allegation as to the previous judicial order under which the alleged lunatic was detained.

The Chief Justice acquiesced in this view.

Mr. Schreiner also pointed out that as a matter of principle it was desirable that in cases in which a lunatic had property his *curator bonis* should be ordered to contribute towards his maintenance.

Dr. Impey, superintendent of Robben Island, deposed that White was of unsound mind and incapable of managing his person or property. He suffered from delusions, but at times he had lucid intervals.

Cross-examined by Mr. Schreiner : White was generally quiet, but should not be removed from the asylum. When he was admitted it was with a certificate that he could not pay. Witness understood that White's wife was alive.

By the Chief Justice : The lucid intervals lasted for about ten days, but the delusions recurred and he was then dangerous.

Miss Catherine Whelan deposed that she was White's sister-in-law. His wife died in December, 1894, and there were two children, a girl of four years and a boy of 2½ years. Witness had been looking after the children since their mother's death. The property was valued at £200, but she held a bond of £50 and there was a debt of £22 besides. Witness wished to be appointed curator of the property and to have the custody of the children. The Whites were married in community of property.

Cross-examined by Mr. Schreiner : The bond over the property was in court. She did not

want to be appointed curator of White, nor did she wish to pay for his maintenance at Robben Island.

Mr. Close said that the object of the application was to secure the property on behalf of the children. He would withdraw that part of the summons regarding the curatorship of the lunatic himself.

Arthur Wood, brother-in-law of the last witness, deposed that his wife's father died in February, leaving property, and appointing witness executor testamentary. Under the will the last witness was appointed guardian of White's two children. Witness had taken out letters of administration, and everything was to be paid out and settled that day. The total value of the property left by the grandfather was about £500 or £600, and that would be paid into the Guardians' Fund. The last witness wished then to take out letters of confirmation as guardian of the children, and draw the interest out of the estate for their maintenance.

The Court granted an order declaring John Walter White to be of unsound mind, and appointed Catherine Whelan curator of his property. The Master was directed to take proceedings for the appointment of a tutor dative to the minor children of the said lunatic. Catherine Whelan ordered, as such curator aforesaid, to pay to the Government the sum of 5s. per month for the maintenance of the said lunatic at the asylum at which he shall be detained. Costs out of the joint estate of White and his wife.

The Chief Justice said : At the time the proceedings were first instituted my impression was that the Court ought to have appointed some member of the bar *curator ad litem*, and not throw the onus on the Attorney-General ; but it was then pointed out that by the Act the Attorney-General was the official curator of all lunatics detained under the Act. I quite agree with the remarks made by the Attorney-General that in these cases some indication ought to be given to him that the person was already detained under the Act, because as the summons was worded the Attorney-General did not know at all whether he was appointed *curator ad litem*, or who the alleged lunatic was. Under the Act the Court may appoint a curator of the property of an insane person, whatever may be done with regard to his person, and in regard to the appointment of a tutor over grandchildren, a grandfather may, if he leaves property to his grandchildren, appoint a curator of the property, but not over the grandchildren themselves. There will be no necessity in the present case to make an order for a curator of the person of the

lunatic, because the proceedings under which he is detained still remain in force. In appointing Catherine Whelan the curator of the property the order will be that she pay 5s. a month out of the estate towards the maintenance of the lunatic. The principle must be upheld that where a lunatic has any property the Government should not be at the sole expense of maintaining him, and, indeed, the Magistrate, before granting an order of detention, should inquire into the circumstances, of the alleged lunatic, as there have been cases in which persons have studiously concealed from the judge that there was any property.

Ex parte DAVIS. { 1895.
June 18th.

Articled clerk—Admission—Error in certificates.

An articled clerk, who had served the full term of his articles, was admitted to practise as an attorney, where his certificates were made in respect of Bertie Brandon Davis, the applicant's real name being Brandon Herbert Davis.

This was an application for the admission of Mr. Brandon Herbert Davis as an attorney. The applicant had served the full term of his articles and had passed the necessary examinations, but he was described in the certificates as Bertie Brandon Davis instead of by his real name.

Mr. Benjamin moved.

The Court ordered the applicant's admission.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné.]

Ex parte HOPLEY. { 1895.
June 18th.
" 26th.

Articled clerk—Admission.

Where an articled clerk had served his articles for the first four and a half months with an attorney, and then acted as a Judge's clerk for twelve months, and served the remaining term of his articles with attorneys.

Held, that he was entitled to admission.

This was an application for the admission of Mr. Frederick Hopley as an attorney and notary.

The applicant was articled to Mr. Attorney Schweizer and served under him from 4th

December, 1891, until 17th April, 1892. He then acted as clerk to his brother, Mr. Justice Hopley, from 19th December, 1892, until 14th December, 1893. From 20th December, 1893, until 25th December, 1894, he again served under Mr. Schweizer, and from 1st January, 1895, until the date of the application he served with Messrs. Van Zyl & Buissinné.

Mr. Benjamin moved and cited *Re Kotze* (7 Juta 66).

Mr. Buchanan for the Law Society: The society does not strenuously oppose but only appear for expression of the Court's opinion.

(a) As to whether articling to a judge is necessary in these cases (Rule 152).

[Court intimated strongly that such articling is quite unnecessary.]

(b) As to breaking of service and for interpretation of *Kotze's* case. Clerks now, under *Kotze's* case as interpreting Rule 152, can serve not more than two years with a judge and one year at least with an attorney. Expression of opinion is desired as to the necessity for serving in each case for an unbroken period; also as to whether service with the judge should precede or follow that with the attorney.

Cur. ad vult.

Postea (June 26th.)

The Court ordered Mr. Hopley's admission.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné.]

GENERAL MOTIONS.

THE PETITION OF JOHN SCHEEPERS.

Mr. Molteno, on behalf of petitioner, applied for leave to sue *in forma pauperis* in an action against his wife for divorce by reason of her alleged adultery.

Order granted.

IN THE MATTER OF THE MINOR BROWN.

Mr. Shippard applied for authority to the Registrar of Deeds to cancel certain mortgage bond passed by the minor's father to secure their maternal inheritance, he undertaking to pass another bond over other landed property of greater value, having sold the land originally mortgaged, and purchased that now proposed to be mortgaged with the proceeds.

The order was granted.

THE PETITION OF THERESA ROTHENBURG.

Mr. Benjamin, for applicant, moved for leave to sue *in forma pauperis* in an action against her husband for divorce by reason of his alleged adultery.

Order granted.

IN THE INSOLVENT ESTATE OF HENRY LE SCHUNKE.

Mr. Maskew applied for further time to the trustees of the said estate in which to file their account, they having been unable to realise the landed property, which is the only asset.

An extension was granted till the 30th December, 1895.

MABINCOWITZ v. MATTHYS. } 1895
June 18th

Costs—Summons—Withdrawal.

An informal summons in a Magistrate's Court having been issued, the case was withdrawn on the day of hearing, but no application was made on behalf of the defendant for his costs, and on the same day a fresh summons was issued.

On the day of hearing the second summons the defendant objected to the proceedings as his costs in the previous case had not been paid.

The Court, on appeal, reversed the Magistrate's decision upholding the objections.

The case of Simpson & Co. v. Fleck (2 Menz. 255) commented upon and distinguished.

This was an appeal from a decision of the Resident Magistrate of Prince Albert in an action in which the present appellant (plaintiff in the Court below) sued the defendant (respondent) for the sum of £8 11s., £6 18s. being balance of rent due, and £1 13s. being money lent and advanced.

The summons was issued on 17th April, the date of trial being fixed for the 25th April. On the morning of the 25th April, at 9.45, before the power to defend had been filed, the defendant's agent was informed that the case had been withdrawn (owing to an informality in the summons). The power to defend was only filed on 26th April, at 10.40 a.m. On the 25th April a fresh summons was issued, the case to be heard on 16th May. On the 25th April the defendant's agent addressed a communication to the Resident Magistrate's clerk, in which he pointed out that his client had been waiting all day (25th April) for the case to be tried, that it had not yet been called on, and that his client had been informed that the case had been withdrawn by the plaintiff, and that, under these circumstances, he objected to any fresh summons in the matter being issued until his client's costs had been paid. This communication was, however, only received in the Resident Magistrate's office on the 26th April, 1895, at 9.50 a.m.

At the hearing of the second summons on 16th May the defendant's agent objected to the proceedings until the costs of the former case, which had been withdrawn, had been paid.

The Resident Magistrate, relying on *Simson & Co. v. Fleck* (2 Menzies, 255), sustained the objection, and held that apart from the question whether the defendant was entitled to costs for personal attendance (having travelled a considerable distance) on the date of appearance as per first summons, he had actually incurred certain costs (stamps, &c.), in connection with the power of attorney to defend put in, which costs were neither paid nor tendered by the plaintiff's attorney.

From this judgment the plaintiff now appealed.

Mr. Juta, Q.C., for the appellant: Even if costs had been incurred they should have been ascertained and taxed by law and set off against the plaintiff's claim; or if the claim were not proved the Resident Magistrate could have given judgment for costs for the defendant. (*Simpson & Co. v. Fleck*, 2 Menz., 255). But as defendant's power of attorney was not filed till the day after summons was withdrawn (for informality of service) no costs were incurred, yet the Resident Magistrate wants appellant to pay the costs of the stamp on that power, as the defendant had appeared in court to object to a fresh summons being issued till he had been paid the costs of the previous case. But the principle clearly is that a defendant cannot bar a plaintiff in this way unless he has demanded his costs and they have been refused.

By the Court: Ought not his expenses as a witness to have been tendered in the fresh summons; and so with any other costs incurred?

Mr. Juta: You would not include tender of costs in the summons, you would wait till defendant taxes the costs and demands them. Defendant cannot keep plaintiff out of his rights by simply objecting and then lying by.

By the Court: *Simpson's case* appears to refer to paying the costs of a previous application where the proceedings had been withdrawn but the Court had given an order for costs in favour of the defendant. (This proved to be so on examination of the records.—*Rep.*).

Mr. Juta: That would reconcile the cases and make *Simpson's case* intelligible; which it is not at present. In the present case there had been no such previous order as to costs. (See cases of *Denys v. Stofberg* (1 Menz., 301); *Van der Bergh v. De Lima* (3 Menz., 401); *In re Gorman* (Buch., 1870, 10); *Niekerk's Trustee v. Theron* (1 Juta, 358).

The Court reversed the judgment and remitted the case to the Resident Magistrate to be

decided on its merits. The costs in this Court and in the Court below to be costs in the cause.

The Chief Justice said: In this case it seems to me that the Magistrate followed the decision of *Simpson & Co. v. Fleck*, as reported in 2 Menzies, and if that decision was correctly reported, the Magistrate was correct in his decision, but I find on examining the records of that case that the report does not give a correct account of what actually took place. In that case there had been a previous summons, which was withdrawn, and then there was a judgment on that summons for costs in favour of the defendant, and when the plaintiff afterwards sued the defendant, the objection was raised, "You have not yet paid the costs you were ordered to pay," whereupon the Court sustained the objection. That case differs entirely from the present case. In the present case there has been no previous order as to costs. If the defendant had appeared when the first summons was made returnable and claimed his costs, and the Magistrate had then given judgment for costs, then the two cases would have been analogous, but on the first summons there was no judgment at all, and therefore there were no costs yet claimable. The Magistrate, therefore, relying upon a case not correctly reported, has in my opinion erred in his judgment. As there had been no order as to costs on the first summons there could be no costs to be paid or tendered before issuing the second summons. The judgment must therefore be reversed, and the Magistrate directed to hear the case on its merits.

[Appellant's Attorney, Messrs. Tredgold, McIntyre & Bisset.]

SUPREME COURT.

[Before Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), Sir JACOB BARRY (J.P., E.D.C.), and Mr. Justice UPINGTON, K.C.M.G.]

Re HALL'S ESTATE, { 1895.
June 24th.

Mr. Close applied in the matter of the estate of the late Eleanor M. Hall for the cancellation of a mortgage bond which had been paid but the bond could not be found. He said the notices had been served as intimated by the

Court at the last hearing, and a search had been made, but no cession of the mortgage bond had been found.

The Chief Justice said: A notice must be published in some Port Elizabeth paper, because there is the possibility of the bond having been ceded. A rule *nisi* will be granted calling on all persons concerned to show cause why an order should not be granted as prayed, the notice to be published in a Port Elizabeth paper, and if no opposition be filed before July 12 no fresh application need be made.

ZIEGLER'S TRUSTEES V. LIEBERMANN, { 1895.
BELLSTEDT AND CO. { June 24th.

Insolvency — Undue preference — General bond — Contemplation of sequestration — Onus.

Z., four months before his estate was sequestrated, and at a time when his assets exceeded his liabilities, passed a general bond in favour of L. & Co.

In an action for undue preference instituted in the High Court of Griqualand West by Z.'s trustees against L. & Co., judgment was given in favour of the defendants, the Court, by a majority, holding that when Z., passed the bond he did not contemplate the sequestration of his estate.

On appeal, the judgment of the Court below was sustained.

This was an appeal from a judgment of the High Court of Griqualand West in an action in which the present appellants (plaintiffs in the Court below), in their capacity as trustees of the insolvent estate of Frans Joseph Ziegler, sued Liebermann, Bellstedt & Co. and Vom Dorp, Seelig & Co. to have a certain general bond passed by the insolvent in favour of the defendants declared an undue preference and null and void under section 84 of the Insolvent Ordinance.

The declaration alleged, *inter alia*, that on 27th January, 1894, Ziegler (who carried on the business of a shopkeeper at Klipdam, in the district of Barkly West, until 15th May, 1894, upon which date his estate was compulsorily sequestrated by order of the High Court) was indebted to the defendants in the sum of £4,900, and on the same date he passed a mortgage bond for the sum of £6,000 in favour of the defendants over all his property, movable and immovable, the bond

to secure to the defendants the payment of the said sum of £1,900, as well as future advances. That Ziegler thereby gave the defendants a preference over all his other creditors.

That at the date of the passing of the said bond Ziegler contemplated the sequestration of his estate, and passed the bond with the intent to prefer the defendants before his other creditors.

The plaintiffs claimed :

1. That the bond should be declared an undue preference, and null and void under section 84 of Ordinance 6 of 1843.

2. General relief and costs.

The defendants, in their plea, admitted that on the 27th January, 1891, Ziegler was indebted to them in the sum of £4,900, and that on that date he passed a general mortgage bond for the sum of £6,000 in their favour, to secure the said sum of £4,900 and any future advances made to him by them up to the sum of £6,000, which they undertook to do in consideration of Ziegler passing the bond.

They denied that in passing the bond Ziegler gave them an undue preference, or that at the time he contemplated the sequestration of his estate.

They further said that at the date of the sequestration of Ziegler's estate there was due by him to them the sum of £5,486 11s. 9d., of which sum £5,254 14s. 5d. was advanced to him by them since the passing of the bond. They said that the bond was made by Ziegler in their favour in the usual and ordinary course of trade or business, and was protected under the 86th section of Ordinance 6 of 1843.

The insolvent was examined and gave the following evidence :

Franz Joseph Ziegler, sworn, states : I began business in Klipdam in 1891, and carried on till my estate was sequestrated last May. In course of business I dealt among other firms with Bennie & Shepherd, Peach & Co., Mosenthal & Co., and the present defendants. Early in 1893 I ordered a large quantity of soft goods from Home. I had at the time considerable local liabilities, but I was quite solvent and business was good. During that year business began to get slack. In October I was embarrassed and couldn't meet my bills. Business had fallen off, and I was overstocked in soft goods. Couldn't sell quick enough at that time to meet the bills, trade was too slack. In November things got worse, and my creditors were pressing, chiefly Mosenthal & Co., Peach & Co., and Bennie & Shepherd, also a few others. On November 11th I wrote to Mosenthal the letter produced. I wanted time which my creditors gave me. I wrote to some and I spoke to others. Things

went worse, and I was still being pressed before the end of the year. I wrote to Peach on December 30 (letter produced). Had I not got time I should have had to surrender. Hadn't taken stock properly, only by guessing. In January defendants didn't press me, but said they couldn't supply me any longer with goods unless I gave some security. They then proposed that I should give a bond, which I did, as I couldn't otherwise get out of the mess. I then owed them £4,900. I passed the bond for £6,000, as Liebermann, who came to see me, promised me another £1,100 worth of goods—liquor and groceries. Up to this I had got credit from others, but about December it was stopped. Liebermann at first proposed that I should give over to them some of my business, and when I objected to that suggested a bond, to which I agreed, as already stated. Think the bond was drawn by Attorney Rhodes. I signed it. I asked Liebermann or Leinberger as to what the other creditors would do. *He replied they would have to wait.* I thought they would be dissatisfied, and expected they would press me, and in that case I should have had to surrender. I had promised the other creditors in the previous three months—October to December, 1893—that I would pass no bond. I promised them all separately. I broke this promise. On February 20 I received the letter produced from Mosenthal. I had admitted the passing of the bond to their representative. Don't think the list had then been published. I had been pressed by Bennie by letter of February 5 to which I replied on the 7th (letter read). I knew then, and when I passed the bond, that if pressed I would have to surrender, and that I would be pressed as soon as the bond became known. After the bond was passed, Leinberger told me to make an inventory. On February 5 I had written to Mosenthal the letter produced, and on the 9th to Peach & Co., from whom I received reply dated 12th (read). Leinberger came out early in February, and told me to take stock. That was on Saturday. I said I would as soon as I had time. He said I must do so at once. I understood he would close me up if I didn't. I then proceeded to take stock. This was on the first Sunday in February. Think it took me three days. I took stock at all the places—seven in all. By Court: Longlands was then already closed, and the stuff was at Klipdam No. 2. I took stock roughly, the clerk writing down on my dictation. I hadn't the invoice prices. The cost prices were written down on some, and on others I put my own estimate. I consider I valued fairly, though roughly. Thought I should come out well. I should have taken out

the things and examined them. Didn't ascertain whether any of the goods were damaged. Portion of them was afterwards found damaged. Those at Klipdam No. 2 had been there a long time. This was the first time I had taken stock. The house properties I valued at cost. I made no allowance for depreciation. There were some goods in the store I couldn't get rid of, not so very much—perhaps £500 worth. I valued them all the same, valued at cost. Didn't know they were unsaleable at the time. Think some portion of the £4,900 which was represented by running bills was subsequently paid off, but the amount proved by defendants on the estate is on balance somewhat more, as they supplied me with cash and goods to value of about £1,000, say £800 goods and £200 cash. In February I called together some of my local creditors—Peach, Holt, Bennie, Mosenthal, and the defendants, also Henwood & Co. My object was to get time. It came to nothing. Don't think the bond was then mentioned. There was another meeting early in March. In April there were several judgments against me, and seeing no other course I asked Goodchild to come out and value the stock, with a view to preparing schedules. Before I could get them prepared my estate was sequestrated on petition of Mosenthal & Co. I was afterwards instructed to collect the debts, and began to do so. I did my best and collected often. Perhaps about £150. I found it difficult. The book produced is the valuation I made in February (put in). I about this time asked Leinberger for a small advance in connection with the transfer of Witfontein, which I did not get. This was about the end of February.

Cross-examined: They had previously advanced me £300 in connection with this purchase. At this time they thought it better to cancel the sale. Don't dispute that the exact amount advanced by defendants, in goods and cash, since the bond may have amounted to £1,206 18s. Some of the previous bills were paid on due date. I may have paid defendants' bills when due to the amount of about £636, thus leaving a net increase of liability to the amount of about £570. I made the statement produced at time of adjudication, for production to Court, showing a surplus of nearly £6,000. Leinberger drafted this statement at my request. *I still say that in May, 1891, my assets, if fairly valued, exceeded my liabilities, and I was satisfied that such was the case when I passed the bond in January and before I made the February valuation.* Bennie, Leinberger, and I had made a previous valuation in November, 1893. This was given to the bank, and showed a surplus of about £5,000. Leinberger was often there,

Think we made a valuation in January, before the bond, showing a surplus of about £6,000. At this time I believed I was solvent. The valuation made with Rattay, in May, was also a fair one. The goods were in sound condition with certain exceptions, perhaps about £500 worth. In the ordinary course, think I should have been able to realise all these goods at cost, and thus be able if not pressed to meet my liabilities. On January 26 when I agreed to pass the bond, I considered I was solvent, if I could gain time and obtain fresh supplies of goods from defendants to go on with. Theirs were rough goods, which were easily sold. Don't remember that I began by asking Liebermann for a further supply of goods before he spoke about requiring security. I said if I could get more rough goods it would give me time to realise the soft goods, and so pay off all my creditors. Liebermann said from what he had seen he was satisfied that I had sufficient assets to cover my debts, and that I had better come in to Kimberley to discuss the matter. He said they would advance to me the further amount of £1,100, if I would give them a bond to cover my present debt to them together with such further advance. I wouldn't have given the bond had it not been for the promised future advance. Think on a previous occasion I had refused to pass a bond to Peach without a promise of a further advance. Think I told Liebermann this. My only object was to get this advance, so as to give me time to realise my soft goods and pay off all my creditors in full. I thought in these circumstances the other creditors wouldn't press me.

By Court: I can't say I thought this arrangement would be satisfactory to the other creditors, but I hoped I might get a little time. I had promised them to give no bond. I was in such a fix I didn't know any more what was the best to do. I am not a man of such intelligence. I believed if I could get time everybody would be paid. The object of the meetings in February and March was to get time.

Cross-examination: Between passing of bond and sequestration I reduced my liabilities to my creditors. I prepared the statement produced in November, 1893 (put in). Also that, previously put in, of February, 1894. I had also made reductions between November and February of my liabilities, as these statements show. All the creditors agreed to my proposal of April 16, except Mosenthal. Under it defendants were not to call up the bond till all the creditors had been paid 15s. in the £ (proposal put in). I thought, even if I had to surrender, the estate would have been sufficient to pay all liabilities. Can't recollect positively whether I told

Liebermann that I had promised the other creditors not to pass any bond. Don't think I told him so. I told him about the proposal made by Peach.

Re-examined: Liebermann and Leinberger both knew that I was being pressed by the other creditors. Told Leinberger before passing bond. It would have taken me about a year to dispose of my surplus stock in the ordinary way. The advance of £1,100 from the defendants wouldn't have assisted me much. When I bought the Klipdam Hotel in 1892 things were much better than in the following year. Meanwhile the number of hotels had increased from three to six. In Klipdam No 1 there had been a distinct falling-off in population. There also then had been an increase in the number of hotels. I bought the hotel at No 1, buildings, stock, &c., for £2,000. I valued stock at £900, buildings at £600, goodwill at £500. Valued it last March at £965.

By Solomon: In December, 1893, I saw Liebermann at Port Elizabeth. Told him I had seen my other creditors, and they were willing to give me time.

By Court: I have been 13 years in business at the Vaal River. When I started at Klipdam in 1891 I consider I was worth about £5,000 or £6,000, including everything. I had it all in buildings and stock. If my estate had to be distributed, I had no reason for wishing to favour Messrs. Liebermann & Co, or Vom Dorp & Co. I was under no special obligation to them before passing the bond. My only reason for passing it was that they promised a further advance. I knew that this would be of no material assistance to me, as the other creditors would press me as soon as the bond was known. I thought the advance might assist me for a few months. It was absolutely necessary for me to get rough goods and groceries in order to carry on any business, otherwise I should have had to surrender at once. I assisted the trustees in managing the business after the insolvency. There was a substantial loss; things were sold too cheap. Think the loss was about £2,000. *The trustees had me arrested for theft and fraudulent insolvency. The charge was that I was appropriating to my own benefit the proceeds of sales in the estate.* I think in February about half the outstandings of £4,000 were good, but they couldn't then be got in. The people have subsequently gone to deal elsewhere, where they have to pay cash, and so the debts are more difficult to collect than those of a going concern. I hoped it would be possible to persuade the other creditors to give me time, and that it would be to their advantage to do so, notwithstanding the bond. As to the criminal

charges, they were brought against me at the last Criminal Sessions. *On the charge of theft the jury disagreed, and that of fraud was withdrawn.* When I gave this bond I thought with defendants' help in cash and goods I would be able to carry on. I think I was first sued among existing creditors by Mosenthal. I think this was in April.

William Armstrong, sworn, states: Clerk to Goodchild. Remember sale of stock in this estate. I took down and overhauled the stock for purposes of sale. This took me five days. Have had considerable experience in a auctioneer's work. I had three assistants in this matter. It took us all this time to do this thoroughly.

Cross-examined: The owner, owing to previous acquaintance with the stock, might have valued more rapidly and equally well.

The majority of the Court (Lawrence, J.P., and Hopley, J.) held that Ziegler did not contemplate insolvency when he passed the bond, and that in passing it he did not intend to prefer the defendants before his other creditors, and gave judgment in favour of the defendants with costs.

Mr. Justice Solomon dissented from the majority of the Court, and held that when the insolvent passed the bond in favour of the defendants, he contemplated the sequestration of his estate, and intended to prefer them before his other creditors. The learned judge expressed the opinion that judgment should be given in favour of the plaintiffs to set aside the bond as an undue preference, except for the sum of £1,2 6, advanced since the date of the passing of the bond.

The plaintiffs now appealed.

Mr. Rose-Innes, Q.C. (with him Mr. Benjamin), for appellants: The Court below found that in the six months before surrender there was no excess of liabilities over assets. We accept the onus of proving contemplation of sequestration and intention to prefer. Now the facts clearly show the contemplation; though nominally solvent, Ziegler yet had contemplation of inevitably supervening insolvency—knowledge that he was on the border line. There was a nominal paper balance; but the liabilities were *immediate* while the assets could not be realised for a long time. As to contemplation of insolvency, see *Thurburn v. Stewart* (3 L.R.P.C. Appeals, 478); and *Hugo's Trustee v. Lindenberg* (2 Juta, 184). The definition on page 187 shows that contemplation is equivalent to expectation: *i.e.*, not certainty but thinking that you will surrender. An insolvent must be taken to contemplate the necessary consequences of his acts (*De Wet's*

Trustee v. Kryauw—Buch. 1879, p. 177) even though he says he didn't.

By Court: There is an important distinction between *De Wet's case* and this. There no one was called to contradict the insolvent's statement, and when the bond was passed the estate was clearly hopelessly insolvent.

Innes: Ziegler can't be heard to say that he thought his creditors would give him time when he was committing a breach of a solemn promise to all of them. As to intention to prefer, as a general rule intention is presumed from contemplation (*Van Reenen v. Abel*—1 Sheil, 332). In *Jordaan's Trustee v. Fletcher & Co.* 4 Sheil, 64) the distinction is drawn in respect of a bond for a past as compared with one for a future advance. The term "ordinary course of business" used in the Ordinance cannot include a general bond passed when there is contemplation of insolvency. The test is: Is it what a commercial man of repute would do?

By Court: The real point is, what is the object of the general bond? Is it to enable the insolvent to continue carrying on, or is it to strengthen the creditor?

Mr. Solomon, Q.C., (with him Mr. Searle, Q.C.), was not called on.

The Court dismissed the appeal.

The Chief Justice said: The really important question in this case is whether at the time when the bond was passed the insolvent's assets exceeded his liabilities. If this question had been decided by the Court below in the negative I should have had no hesitation in saying the Court would have been bound to hold that there was contemplation of sequestration. But the Court below has held that there was no proof—at all events that at the time the bond was passed—that the assets were less than the liabilities. They held in effect that the assets did exceed the liabilities. Well, in such circumstances—quite independent of the Act of 1884—it is very difficult to hold that a person who believes that his own assets exceed his liabilities—I say it is difficult to hold in such circumstances—that the person who passes the bond does so in contemplation of sequestration. Then we have the Act of 1884, which in circumstances like the present throws the onus upon the person seeking to set aside the transaction. Now in this case on whom does the onus of proof lie? The onus of proof in my opinion clearly lies on the plaintiffs, and the plaintiffs have failed to satisfy that onus, and therefore our judgment must be to uphold the previous judgment. There is strong force in the reasons of Mr. Justice Solomon, but we must hold that the judges in the Court below are the

best judges of how far the insolvent modified his evidence given in chief, and we could not well under the circumstances reverse the judgment of the Court below. It is quite true that in his examination in chief the insolvent made some damaging statements, but in cross-examination he modified these statements. "My only object," he says, "was to get this advance so as to give me time to realise the soft goods, and to pay off all my creditors in full, and I thought under those circumstances that the other creditors would not press me." I think that this statement is borne out to some extent by the other facts proved in the case. It is clear from the evidence that after the bond had been passed the insolvent did reduce his liabilities to the other creditors, and increased his liabilities to the defendants. It is a circumstance also in favour of the defendants that it was a bond not only for past liabilities, but also for future advances, and that the defendants did make these advances in full up to the amount of the bond, and even beyond it. If there had been an intention to prefer I think the circumstances in this case would have been very different. Upon the whole, therefore, I am of opinion that the Court must support the judgment of the Court below, and that the appeal must be dismissed with costs.

Sir Jacob Barry said: I am also of opinion that the appeal must be dismissed. The question is, whether there was any contemplation of insolvency and intention to prefer. If we had had to deal with the question of contemplation in terms laid down by the judgments before the Act of 1884—as in the case of *Thurburn*—then the Court would have been justified, I think, in coming to the conclusion that possibly there was a contemplation of insolvency in this case. But we cannot apply these decisions. We cannot say that the man's position was such that insolvency was actually impending and substantially inevitable. I am satisfied from the evidence in this case, and from the finding of the Court below, that the insolvent could not be said to be contemplating the sequestration of his estate. No doubt he was embarrassed, and being embarrassed sought help and promised he would pay off certain sums per month, and he did so to other creditors, but he did not do so to the defendant, and the defendant finding this out, says, "You must pay me, I must insist on getting something, let me buy some of your property." Ziegler says, "No, I won't do that," upon which it was suggested by the defendant that he must have a bond. Ziegler knew that the other creditors had refused to give him help before, and although he had promised that he would not give a

bond, he yielded to this suggestion in the hope of saving a surplus to himself after paying off his creditors. Can we set that view aside, and say that the finding of the Court below was wrong—that the Court erred in believing that statement? It was no doubt the statement of a sanguine man, but the Court did come to the conclusion that the man believed he had a surplus, and by good management would succeed in saving his estate. One does sympathise with the creditors because they will get nothing; on the other hand, but for the obstinacy of Mosen-thal, they would have got 15s. in the £, and probably quite as much as the defendants. The refusal has led to this case, and the result is that we cannot set aside the finding of the Court below.

Mr. Justice Upington also concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondents' Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

LONDON AND SOUTH AFRICAN
EXPLORATION COMPANY V. } 1895.
OFFICIAL LIQUIDATOR NORTH- } June 24th.
EASTERN BULTFONTEIN AND } " 25st.
THE REGISTRAR OF DEEDS, } July 4th.
GRIQUALAND WEST.

Diamond mine—Claimholders—Lessor and lessee—Insolvency—Tacit hypothecation of lessor—Winding up—Griqualand West Ordinance, No 16 of 1880, sections 6 and 7—Act 19 of 1883, sections 25 and 70—Transfer of claims—Construction of Statutes.

The official liquidator of a Company, which at the date of the winding-up order was a lessee of claims in the Bultfontein Diamond Mine, is entitled to an order compelling the lessor to allow transfer and registration of such claims, although all the rents payable in respect of such claims have not yet been paid to the lessor.

Different provisions in a Statute should, if possible, be so construed as to be consistent with each other, and therefore the privilege conferred upon certain classes of creditors of claimholders by the 25th Section of Act 19 of 1883 must be confined to cases to which the 70th Section does not apply.

The priority which lessors enjoy under the 70th Section exists independently of the tacit hypothecation for one year's rent

which as such lessors they are entitled to on the lessee's goods and chattels brought on the land.

The deed of lease authorised the lessee to transfer the claims during the term on condition that no such transfer should be made unless all rents should have been paid.

Held, that this condition applied only to voluntary transfers.

This was an appeal from a judgment of the High Court of Griqualand West in an application in which the first-named respondent was applicant and the present appellants and the Registrar of Deeds were respondents.

The facts are as follow: On 18th December, 1894 the official liquidator sold by public auction certain claims in the Bultfontein Mine together with the depositing sites appertaining thereto which claims and depositing sites formed part of the assets of the North Eastern Bultfontein (Limited) in liquidation, and thereafter on 18th January, 1895, the sale was confirmed by the High Court and the liquidator was ordered to effect transfers to the purchasers.

The claims were held by the North-Eastern Bultfontein, by virtue of a lease and articles of agreement dated 6th June, 1893, entered into with the Exploration Company, and were registered with the Registrar of Deeds in the name of the company under the provisions of Griqualand West Ordinance 16 of 1880.

One Mendelssohn, of Kimberley, was a purchaser at the sale of fifty of the claims referred to and he subsequently purchased a further block of six claims by private treaty.

On 4th February, 1895, the liquidator executed a cession and assignment to Mendelssohn of the lease of the claims purchased by him, which cession was lodged for registration with the Registrar of Deeds under the provisions of Griqualand West Ordinance No 16 of 1880.

Thereupon the Registrar of Deeds informed the liquidator that he had received notice from J. B. Currey, in his capacity as the manager of the London and South African Exploration Company (Limited), the lessors of the claims, protesting against any cession or transfer of any of the claims until such time as the sum of £50 15s. 0d., alleged to be due to his company as rent on each of the claims, should have been paid.

The rent claimed by the Exploration Company was calculated at the rate of 30s. per month, and was reckoned from the 1st day of January, 1891, up to the 28th day of February, 1895, less twelve months' rent waived since the

date of the liquidation of the North-Eastern Bultfontein (Limited), namely, the 31st day of August, 1893.

The London and South African Exploration Company (Limited) proved against the said North-Eastern Bultfontein (Limited), in liquidation, for the sum of £48 rent alleged to be due on each claim reckoned from the 1st day of January, 1891, less certain amounts credited in account.

A further sum of £27 has accrued as rent upon each claim since the liquidation of the company, of which the sum of £18 per claim has been waived by the said London and South African Exploration Company (Limited) as aforesaid.

The liquidator gave due notice to the manager of the London and South African Exploration Company (Limited), of his willingness to pay to him the amount of rent that has accrued since the liquidation of the said North-Eastern Bultfontein (Limited), and also at the same time informed him that whatever dividend was due to him in respect of the rent claimed by him up to the date of the liquidation of the company, namely, the 31st day of August, 1893, would be paid to him in ordinary course on the confirmation of the liquidation and distribution account by the High Court, but the manager of the London and South African Exploration Company refused to give or to recognise any transfer or cession of the claims until the whole amount claimed by him in respect thereof, viz., the sum of £50 15s. per claim, had been paid.

The Registrar of Deeds also refused to register the cession and transfer of any of the claims until proof should have been given him of the payment of such rents and rates as might be due in respect thereof.

The liquidator alleged that besides Mendelssohn several other persons purchased claims in the mine at the sale, and such purchasers had been severally served with a notice from the said London and South African Exploration Company (Limited), informing them that transfer of the claims so purchased by them would not be effected until the total sum alleged to be due to the company on each of the claims should have been paid.

The liquidator further said that by reason of the premises he was unable to give proper effect to the orders of the High Court directing him to sell the claims and other assets of the North-Eastern Bultfontein, (Limited), in liquidation, and to give transfer thereof to the purchasers.

The assets of the North-Eastern Bultfontein (Limited) sold by the liquidator realised a total sum of £32,200, or thereabouts, the claims having

realised £8,191, and the blue ground, machinery, and other assets the balance.

A number of claims, namely 381, and some other assets are still unsold, the marketable value whereof does not exceed £3,000.

The trustees for the debenture holders have proved a claim against the company in liquidation for the sum of £89,203 18s., the sum of £50,000 whereof they claim as a preference by virtue of a mortgage bond for that amount specially hypothecating the claims belonging to the company which was registered in the Deeds Office, Kimberley, on the 12th July, 1893, and the balance whereof they claim as a preference under and by virtue of an indenture dated the 14th day of November, 1892, entered into between the company and the trustees of the said debenture holders.

The lease entered into between the two companies contained, *inter alia*, the following provisions.

And also with full and free power and authority, without the knowledge or consent of the lessors, to sublet, wholly or in part, and transfer, cede, assign, mortgage or hypothecate, the same or any one or more of them during a term of five years, as hereinafter mentioned and provided for.

Provided always that every such transfer, cession, or assignment as aforesaid shall be subject to the following terms and conditions:

I. No such transfer, cession, or assignment shall be made, unless all rent or licence money due and owing to the lessors by virtue of these presents on the claim or claims proposed to be so transferred or assigned shall have been duly paid up by the lessees or person or persons liable to pay the same.

The question to be decided was whether the official liquidator of the North-Eastern Bultfontein (Limited) was entitled to an order on the Registrar of Deeds and the London and South African Exploration Company for the registration of the cession and transfer of certain fifty-six claims in the Bultfontein mine, sold by the liquidator in his capacity as such to Mendelssohn, and which he claimed to have registered in the name of the transferee, the claims at present standing in the name of the North-Eastern under the lease above referred to from the Exploration Company.

The appellant company objected to this transfer on the grounds that certain arrears of rent accrued due on the claims previous to the winding-up order had not been paid or tendered to them, and the Registrar of Deeds, in view of this objection, and of the usual practice in his office in similar matters, refused to register the cession without an order of Court.

The Exploration Company filed their proof in the liquidation for these arrears of rent, proving as preferent creditors for the rent for the twelve months immediately preceding the winding-up, and as concurrent creditors for the balance.

The appellant company based their claim on two grounds, namely, on statute and on contract, their contention being that such a lien was created both by the Statute law of the country and by their contract with the lessees.

The Statutes relied on were Griqualand West Ordinance 16 of 1880, Act 19 of 1883, and Act 25 of 1892.

The local Ordinance provides by section 6 that the law relating to the registration and transfers of titles of immovable property held on quitrent tenure, shall apply *mutatis mutandis* to claim property, while the Act of 1883, section 25, provides that no transfer of any claim shall be made until the same shall have been registered by the proper officer duly appointed in that behalf, and no such registration shall be made until all rates, liens, licence moneys, royalties, or rents due and payable in respect of the property to be transferred shall have been paid.

Section 70 also provides that claim licences shall have a first preference for amounts due in respect of any claim in any digging or mine. The main question for decision was as to the proper construction of section 25, above cited, and whether it was to be held applicable to voluntary transfers alone or whether it was to be understood as creating an exception to the ordinary law of insolvency and liquidation, as laid down in the Insolvent Ordinance and the Companies Act, in so far as it might affect or modify the relative rights *inter se* of the various creditors and classes of creditors thereunder.

The Court below gave judgment in favour of the applicant, and from that judgment the present appeal was brought.

Mr. Searle, Q.C. (with him Mr. Watermeyer), for the appellants: The lease is in the form always employed by the London and South African Exploration Company. The North-Eastern Bultfontein had the hiring from the 1st January, 1891, though the actual written lease was entered into later. Now sections 6 and 7 of Griqualand West Ordinance 16 of 1880 take the leases out of the ordinary operation of the Insolvent Ordinance and common law so far as regards termination of the leases by insolvency. As to section 25 of Act 19 of 1883, regarding transfers of claims: for a long time the company held that that Act did not apply, except as to Part IV., to their leases. But it has always been assumed that no transfer of quitrent

property could take place until all the arrear quitrent had been paid.

De Villiers, C.J.: Would not the long continued practice in the Deeds Office, founded on the Proclamation of 1839, have become law; This practice has always been taken for granted by the conveyancers.

Mr. Searle: As to section 79 of Act 19 of 1885, why should that be inserted if it referred only to voluntary assignments?

De Villiers, C.J.: Section 70 of that Act lays down the order of preference for amounts due on any claim: and must be read in connection with section 25. The Legislature contemplated an order of preference, yet if there is to be no transfer without payment of arrears how could section 70 ever come into operation at all?

Mr. Searle: The right to full payment might in certain cases be waived: transfer might be allowed to go through where the full amount cannot be obtained.

De Villiers, C.J.: See section 68, providing for recovery of liens on a claim. Now under section 25 the holder of a lien can object to transfer—but section 68 seems to show that where there is execution of a judgment the parties interested under section 25 cannot object. Does not Court below conclude from this that section 25 only refers to voluntary assignments, not to execution or insolvency proceedings.

Mr. Searle: The judges went more on the agreement than on the Statute: you cannot read into the Statute what the judges in the Court below held. There had to be the special provision in section 68 as to execution writ-holders, so there should be special provision to take away the clear right of the creditors in insolvency.

De Villiers, C.J.: The claims are worth £8,000, the balance of the asset is represented by the machinery. The creditors have their tacit hypothec for one year over the machinery (as *res in vectae*): but can't they first come on the whole of the claim proceeds for arrear licences under section 70?

Mr. Searle: The liquidator has not admitted even the tacit hypothec for one year. There is no inconsistency in proving and then claiming under section 25.

De Villiers, C.J.: Is not the "proving" a tacit admission of the trustee's right to sell in order to pay the claims proved? And section 70 can only come in if there is a sale. How does it fit with section 25 unless latter only applies to voluntary assignments?

Mr. Searle: If they let the transfer through, then section 70 only comes into operation if

they don't insist on their right under section 25. The company could not have contracted out of the operation of section 7 of Ordinance 16 of 1880. By English law the difficulty would not arise: but in our law the lease has to go on in spite of the insolvency and the lessor is entitled to the benefits of the Statute.

Mr. Rose-Innes, Q.C. (with him Mr. Solomon Q.C.), for the respondents: If the appellants contention is correct see the results. The whole claim of the debenture holders would be swept away making the bond registered in favour of the debenture holders totally inoperative. The first position of the London and South African Exploration Company was only to claim on a lien. But now it is not a question of lien at all: and they would be out of court if they were to ask for it. The only point now is their right to forbid transfer. It may be dealt with either under statute or contract. Mr. Searle relies on statute though in the High Court his clients relied on contract. Now section 25 of Act 19 of 1883 must be read with sections 18 and 20. Ordinance 16 of 1880 allows the claimholder on Crown land to get quitrent title instead of a mere licence holding: and sections 20 to 25 of Act 19 of 1883 refer only to certificates of registration given to licenceholders who had not converted their holdings into quitrent titles. But section 25 is taken from Ordinance 5 of 1871, which deals only with diggings on Crown land: not on private lands at all. The documents (leases) now before the Court are liable to the ordinary charges which other registered documents are liable to: and not to the charges on claim licences. In fact these leases are not claim licences at all: and sections 20 to 25 do not apply to leases such as these, but only to claim licences. (See *South African Loan and Mortgage Agency v. Cape of Good Hope Bank*) (6 Juta, 163.) Section 79 is puzzling, but does not apply to these cases. These leases are registered with the Registrar of Deeds, not the Registrar of Claims: and surely section 79 does not refer to allowing them to be transferred before the Registrar of Claims on a 2s. 6d. fee instead of the usual 4 per cent. Mr. Judge is both Registrar of Deeds and of Claims: but different books are kept. Even supposing section 25 does apply: yet it applies only to voluntary surrender, otherwise companies could evade the Insolvent Ordinance and Companies Act: for then they could sit by till they are paid, whereas the policy of these Acts is to compel every creditor to take a proper course.

De Villiers, C.J.: Take the case of *Jus Retentionis*: the party entitled need not deliver up to the trustee till he is paid: and is not

section 25 intended to give the company a *Jus Retentionis*?

Mr. Innes: But this is not a case of *Jus Retentionis*: there is no possession by liquidators such, e.g., as a tailor has. See *Maxwell on Statutes*, page 75. The sections preceding section 25 refer to voluntary transfers: and section 25 would have referred to the Insolvent Ordinance and the Companies Act, if it had been intended to evade them. Again: See sections 68 and 70. If section 70 had been merely a supplementary remedy where a creditor has not availed himself of section 25 the latter would have been referred to.

Mr. Searle in reply: In questions of contract the Act clearly innovates on the Insolvent Ordinance; because Section 7 to a large extent does and is intended to introduce such innovation by making it compulsory for a lease to run on even after insolvency (see *Preston & Dixon v. Biden's Trustees*, 1 Appeal, 322). The lease itself is registered and a duplicate filed with the Registrar of Deeds; the greatest publicity is given in the matter. As to the lessees *jus in re* and the extent to which it holds, e.g. as binding on the lessor and his successors, see *Green v. Griffiths* (4 J. 346.)

Mr. Giddy directed the attention of the Court to a Government advertisement of the 31st May, 1839, directing the Registrar of Deeds not to pass transfer of any property unless the quitrent due thereon had been paid, and the last receipt exhibited to him, the Government holding him harmless for so doing. Mr. Giddy also referred to "Foster's Practice of the Deeds Office," p. 11, and also cited *Basson v. Civil Commissioner of Paarl* (Buch., 1868, p. 225) and *Paarl Board of Executors v. Civil Commissioner of Paarl* (Buch., 1870, p. 1), in which the practice had been discussed, but the point was not decided.

Cur. ad vult.

Postea (July 4th.)

Judgment was delivered.

The Chief Justice said: The question to be determined, is whether the official liquidator of a company, which at the time of the order for its winding-up was a lessee of claims in the Bultfontein diamond-mine, is entitled to an order compelling the lessor as well as the Registrar of Deeds to allow a transfer and registration of such claims in the name of a purchaser although all the rents payable in respect of such claims had not yet been paid. The lessors were the London and South African Exploration Company, and the lessees were the North-East Bultfontein Company. Upon the winding-up of the latter company the lessors filed their proof in liquidation for the arrears of

rent, proving as preferent creditors for the twelve months immediately preceding the winding-up order, and as concurrent creditors for the balance. The proof was admitted, and the liquidator was willing, in the due course of administration, to pay to the lessors their *pro rata* share of the net assets with due regard to the order of preference, but he refused before transfer to the purchaser from him of the claims, to pay any portion of arrear rents, except only such as had accrued since the liquidation of the company. The Registrar of Deeds also refused, without an order of Court, to allow the registration of the claims in the absence of any proof that all arrears of rent had been paid. Upon the application of the liquidator, the High Court of Griqualand made an order compelling the Registrar of Deeds and the Exploration Company to register cession and transfer of the claims to the purchaser on proof of payment or tender of rent accrued since the date of the winding-up. Against this order the company now appeals. It is not quite clear from the reasons furnished by the learned judges in the Court below, whether the fact that the applicants proved their debt in liquidation affected the decision. Mr. Justice Hopley indeed seems to have held that payment for the rent due up to the date of the winding-up "must be considered to have been made by the proof of debt and the rights which the landlords have under that proof." I gather, however, from his previous remarks, as well as from the reasoning of the two other judges that, even if the appellants had not proved their debt, they could not, by withholding their consent to the transfer, legally put a pressure on the liquidator for payment to them of more than the ordinary rules of preference would allow them to receive. The proof of their debt by the appellants ought not, in my opinion, to affect our decision. If they had the right to object to a transfer before the rent was paid, the mere fact that they have proved their debt does not amount to a waiver or renunciation of their rights. The two modes of securing payment of their debt are perfectly consistent with each other. The value of the claims might, by reason of the exhaustion of the diamonds or from some other causes, have been reduced to less than the arrears of rent, and in that case it was important for them to take the benefit of the tacit hypothecation which the law gives them upon all *invecta et illata* (*Van der Kessel*, Thes. 453. Act 5, 1861, section 5), as well as to take their *pro rata* share of the assets with the other concurrent creditors. In fact, the claims did realise less than the amount of arrears, but the total assets, including

the diamondiferous soil taken out of the mines, and the machinery placed on the ground, realised more than the amount of arrears of rent. The proof of their debt will enable the appellants to obtain part payment out of the proceeds of the machinery and diamondiferous soil, but it does not debar them from insisting upon any other rights which the law or the terms of the lease may give them to secure payment of the whole debt due to them. The question, therefore, which I stated at the outset, still remains for consideration. It is common cause that the order for the winding-up of the company did not put an end to the leases of the claims held by them. It became the duty of the liquidator, upon his appointment, to take these claims under his control, in terms of the 148th section of the Companies Act, 1892, and, for that purpose, no formal transfer to or registration in his name was required. As was correctly remarked by the learned Judge-President, although the claims are not in terms vested in the liquidator, he becomes a trustee of the property of the company for the creditors of the company. As such trustee he has the power, with the sanction of the Court, "to sell the movable and immovable property, effects, and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels," in terms of the 149th section. The appellants admit the respondent's right to sell the claims in question, but they dispute his right to effect a registration of the claims in the name of the purchaser without payment of all rents in arrear. The respondent, on his part, admits that the company could not have insisted upon such registration without tendering the arrears of rent, but he contends that, as liquidator of the company, he must realise the assets, and that he cannot do so without the power to transfer the claims to a purchaser. The 6th section of the Griqualand West Ordinance, No. 16 of 1880, enacts that the law relating to the registration of titles to immovable property under quitrent tenure shall apply to the registration of leases of claims under that ordinance. The practice in regard to quitrent lands is firmly established. As far back as 31st May, 1839, an advertisement was published in the "Gazette" by the Governor prohibiting the Registrar of Deeds "from making transfer of any quitrent property until satisfactory proof shall have been adduced before him that all rent, and arrears of rent, if any, on such property have been duly discharged." This advertisement was quite in accordance with previous

practice, and its validity has never since been questioned. On inquiry from the proper authorities I find that no difference is made in the Deeds Office between transfers tendered on behalf of trustees of insolvent estates and transfers tendered on behalf of others. In every case the proof of payment of all arrears until the end of the previous year is demanded, and no transfer is allowed without such proof. The trustee always pays the arrear quitrent, and in his accounts the Government appears as preferent creditors to whom the quitrent has been paid as a preferent debt. This practice does not assist the Court, because no instance has been referred to in which any trustee has paid more than the three years' rent for which the Government has a tacit hypothecation. It is unnecessary to decide whether the practice of the Deeds Office has hardened into law so as to be binding upon the trustees of insolvent claimholders under section 6 of the Griqualand West Ordinance, because the rights of the parties to the present suit are more precisely defined by a later statute. The 25th section of Act 19 of 1883 enacts that "no transfer of any claim shall be made until the same shall have been registered by the proper officer duly appointed in that behalf, and no such registration shall be made until all rates, liens, licence moneys, royalties, or rents due and payable in respect of the property to be transferred shall have been paid." If this section were not in any way qualified by any other provision of the Act, it would be difficult to deny the right of the appellant company to insist upon the payment of all arrears of quitrent before transfer can in any case be permitted. It is clear, however, from the 68th section that in the case of a sale of any claim in execution of any judgment for the amount of a lien registered against such claim, the lienholder, although equally privileged with the lessor under the 25th section, cannot insist upon payment of his lien in full before transfer. The sale and transfer must be allowed to go through, and he cannot recover more from the claimholder than the amount realised by the sale. The 70th section of the Act still further qualifies the privilege conferred by the 25th section on those who have charges upon the claims: "The following order of preference for amounts which may be now due and owing, or may hereafter become due and owing, upon or in respect of any claim in any digging or mine is hereby established, viz.: (1) Claim licences; (2) rates and dues lawfully imposed in respect of such claims; (3) expense of work done . . . by order of the inspector; (4) liens; (5) conventional hypothecations; (6) fines or penalties recovered in any court in respect

of such claims." If each one of the privileged creditors mentioned in the 25th section had the unqualified right, even in case of compulsory distribution of the debtor's assets, to insist upon the payment of his debt before transfer, it would be in his power altogether to defeat the operation of the 7th section. The Mining Board, for instance, to whom rates are due, could prevent a realisation of the claim until its own debt is paid and thus force on a different order of preference from that which "is established" by the 70th section. The two sections should, if possible, be so construed as to be consistent with each other. It is no strained construction of the 25th section to hold that the privilege thereby conferred on certain classes of creditors was intended to be confined to cases to which the 70th section does not apply, and that, when a question of preference arises among those creditors, as in the case of insolvency or sale in execution, the realisation and transfer must be allowed to proceed without hindrance for the purpose of giving effect to the order of preference established by the 70th section. If this view is correct, the appellants have no right under the Act to prevent the sale and transfer of the claims to the purchaser, but they have a first charge upon the proceeds of the sale for the rent in arrear. This priority they enjoy by virtue of the 70th section of the Act quite independently of the tacit hypothecation, which, as lessors, they have on the lessee's goods and chattels brought upon the land for one year's rent. Any sums received by them would of course be subject to the deduction of 2s. per claim for good government tax, payable to the Government, in accordance with the decision of the Court in *Government v. Exploration Company*. It is further contended, on the appellants' behalf, that if neither the Ordinance of 1880 nor the Act of 1883 gives them the right now claimed, their contract with the lessees, as embodied in the deed of lease, gives them the right. That contract, however, which was made in 1891, must be read by the light of the then existing law. The appellants were the owners of the land leased, but the Legislature had greatly modified their ordinary rights as lessors and owners. Under the 7th section of Ordinance No. 16 of 1880 the leases of claims remain in force, notwithstanding the insolvency of the lessee. Under the Act of 1893, as I have already shown, an order of preference is established in respect of the proceeds of leasehold claims sold in insolvency. The appellants must be taken to have known in 1891 that, in case of the insolvency of the company to whom they leased the claims, they would have a first charge upon the proceeds of the sale of the

claims in addition to a tacit hypothecation for a year's rent upon all *invecta et illata*. I do not propose now to dismiss the question whether the appellants could not then, by the insertion of appropriate words, have stipulated for the right to prevent any realisation of the claims in the course of liquidation until all arrears of rent have been paid. I am satisfied, however, that the language actually used in the deed of lease is not sufficient for the purpose. The deed authorises the lessees to transfer the claims during the term on condition that no such transfer shall be made unless all rent or licence moneys owing to the lessors on the claims shall have been duly paid. This condition is clearly applicable only to voluntary transfers, and not to transfers which are necessitated by the insolvency of the lessees for the purpose of distributing the proceeds amongst their creditors in due order of preference. In fact, the claims in question realised less than the amount of arrears of rent due, and if the appellants' contention is correct, they would now be entitled, by withholding their consent to the transfer, to put pressure on the liquidator to pay to them in priority more than the proceeds of the sale and the year's rent for which they have a tacit hypothecation in the machinery and diamondiferous ground. For the reasons already stated this contention cannot, in my opinion, be sustained, and the appeal must therefore be dismissed with costs.

Their lordships concurred.

[Appellants' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondents' Attorneys, Messrs. Van Zyl & Buissinné and J. & H. Reid & Nephew.]

SUPREME COURT.

[Before Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), Sir JACOB BARRY (J.P., E.D.C.), and Mr. Justice UPINGTON, K.C.M.G.]

Ex parte CLOETE.

1895.
June 25th.

Mr. Searle, Q.C., moved for the admission of Philippus Albertus Myburgh Cloete as a conveyancer.

The order was granted.

BORMAN AND CO. V. HAUPT.

Upon the application of Mr. Searle, Q.C., the estate of Pierre Francois Haupt was finally adjudicated as insolvent.

[Before Sir JACOB BARRY (J.P., E.D.C.) and Mr. Justice UPINGTON, K.C.M.G.]

KOHLER AND OTHERS V.
BAARTMAN.

1895.
June 26th.
" 27th.
" 28th.
July 1st.
" 2nd.
" 5th.

Prescription—Perennial stream—Artificial channel—Riparian proprietors.

Two perennial streams, the Groot River and the Middle River, have their source in Simonsberg in the Paarl District, and flow side by side in separate natural channels on to and through the quitrent farm "Walvekloof," of which B. (defendant) owns one-fifth.

From "Walvekloof" the streams flow on to the farm "Annex," and thence to the farm "Le Plaisir Merle" (both the property of the defendant), where they meet, and under the name of the "Groot River," flow in one natural channel through the adjoining farm "Rust en Vrede," thence across the farm "Zion" into the farm "Watervliet."

The river then crosses into the farm "Ongegund," where it joins the Berg River which passes through the farm "Kunenberg."

On "Ongegund" and "Kunenberg" (the latter now divided into three farms) K., and the other plaintiffs have gardens, orchards, and cultivated lands.

These lands are watered by leadings from small dams erected on each property along an artificial furrow constructed partly on "Watervliet," partly on "Ongegund," and partly on "Kunenberg," the furrow being fed from a dam (S.) on "Watervliet," constructed in the bed of the Groot River with the consent of a former owner of "Watervliet."

This dam and furrow were constructed more than 100 years ago and have ever since continuously conveyed the Groot River water, which is diverted at dam S., and which has been used by the various owners of plaintiffs' lands both for domestic and irrigation purposes.

On the original diagrams accompanying the grants of "Walvekloof" and "Annex," both

dated 15th September, 1819, the words "watercourse for Kunenberg and Ongegund" appear on the course of the Groot River, and in the original grant of "Wolvekloof" there is a provision that the watercourses are to run free and undisturbed, but there is nothing in the original grant of "Annex" prohibiting the owners of that farm from interfering with the water of the Groot River, whereas on the other hand it provides that "the grantee is bound within three years to bring the farm into such cultivation as it is capable of."

During the past 30 years the present owner of "Annex," and his predecessors in title, used portion of the Groot River for irrigation and other purposes, the remainder being allowed, with a few interruptions at different times, to flow down in its ordinary course.

Held, in an action by the owners of "Ongegund," and "Kunenberg," against the owners of "Annex," in which both parties claimed the exclusive use of the Groot River, (1) that both claims had failed and (2) that the defendants had not acted in such a manner as to deprive the plaintiffs of their riparian rights.

Held, per Upington J., that the artificial channel constructed from dam S. had acquired the attributes of a natural channel.

This was an action for an interdict and for other relief, instituted by Messrs. Kohler, Marais, Truter, and Cillie, against Jan Frederick Baartman and Albertus Bernardus Baartman.

1. The plaintiffs are the registered owners respectively of the farms Riverside (formerly known as Welbevonden), Ungegund, Zonnebloem, and Kunneberg, which farms are situated at Groot Drakenstein, in the division of the Paarl. The first-named defendant is the owner, and the second-named defendant is the lessee and occupier of the farm Le Plaisir Merle.

2. The plaintiffs in their declaration alleged that a perennial stream of water rises upon certain quitrent land called Wolvekloof, of an undivided one-fifth share, in which land the second-named defendant is the registered owner, and after flowing over the said land the said stream flows down to and over the farm Le Plaisir Merle, and thence over certain land belonging to one

Du Preez, and thence down to and over the farms belonging to the plaintiffs.

3. That neither as owner of portion of the farm Wolvekloof, nor as owner of the farm Le Plaisir Merle, is the first-named defendant entitled to use any portion of the water of the said stream, nor is the second-named defendant entitled to such use.

4. That for a period longer than the period of prescription the plaintiffs and their predecessors in title have uninterruptedly, and as of right and adversely to the owners of Wolvekloof and Le Plaisir Merle, used and enjoyed the whole of the water in the said stream for domestic and distilling purposes, and for purposes of irrigation, and are entitled to continue such use and enjoyment.

5. That at divers times between the 15th January and 20th February, 1895, the first-named defendant wrongfully and unlawfully diverted the water of the said stream, and used the said water for purposes of irrigation upon a portion of the farm Le Plaisir Merle.

6. That by reason of the said wrongful and unlawful diversion, the plaintiffs were upon the said occasions deprived of water, not only for irrigation, but for domestic purposes and for watering their stock and distilling.

7. That the second-named defendant claims the right so to divert the water of the said stream for the purposes of irrigation upon his farm aforesaid.

8. That by reason of the wrongful and unlawful acts of the defendant J. F. Baartman, as aforesaid, the plaintiffs have sustained damages to the extent of £75.

The plaintiffs claimed as against both defendants:

(a) An order that they are entitled to the exclusive use of the water in the stream aforesaid, and interdicting the defendants from diverting any portion of the said stream, alternatively against the defendants.

(b) An order interdicting them from diverting so much of the water of the said stream as to deprive the plaintiffs of water for domestic purposes, or for watering their stock or distilling.

(c) Against the defendant, J. F. Baartman, payment of the sum of £75 for damages as aforesaid.

(d) Alternative relief against both defendants with costs.

The defendants in their plea admitted paragraphs 1 and 7 of the declaration and denied the allegations in paragraphs 3, 4, 5, and 8.

They admitted the allegations in paragraph 2 save and except that they denied that the stream mentioned in that paragraph flows over the land of the plaintiffs.

They allege that the second-named defendant is the registered owner and the first-named defendant the lessee of a certain piece of ground situated on the south side of Le Plaisir Merle, and adjoining that farm and the place Wolvekloof, commonly known as the Annex le Plaisir Merle, over which piece of ground the aforesaid stream flows in addition to those places already mentioned.

That the defendants are entitled to use the waters so flowing over the said Annex le Plaisir Merle for the purposes of irrigation of the said Annex le Plaisir Merle, and they have so done, but the water in the said stream has not been used for Le Plaisir Merle, nor any other place belonging to or hired by the defendants.

That for a period far longer than the period of prescription, the defendants and their predecessors in title have uninterruptedly, openly, as of right and adversely to the plaintiffs and their predecessors in title, used and enjoyed the water in the said stream for irrigation purposes, for which purposes they have continually, and long prior and up to the date of the alleged diversion diverted and used the water flowing in the said stream.

That defendants during their occupation have always allowed sufficient water to flow in the said stream for the domestic and ordinary uses of places over which the stream runs.

The defendants claimed in reconvention £100 damages alleged to have been sustained by reason of the interdict obtained by the plaintiffs against J. F. Baartman on 20th February, 1895.

They further claimed an order that they were entitled to use the water running in the said stream for irrigation and other purposes.

The plaintiffs in their replication alleged that the property referred to as Le Plaisir Merle in the declaration included the piece of ground called Annex Le Plaisir Merle in the plea as well as the original homestead of Le Plaisir Merle.

They denied that the interdict was wrongfully and unlawfully obtained and that the defendants had suffered any damage by the granting of the interdict.

Rejoinder general.

Mr. Searle, Q.C., and Mr. Molteno for the plaintiffs.

Mr. Tredgold and Mr. Buchanan for the defendants.

The facts and contentions appear sufficiently from the judgments.

Cv. ad vult.

Postea (July 5th).

The Court delivered judgment.

Sir Jacob Barry said: Plaintiffs in their declaration allege that a perennial stream called Groot River rises on the farm Wolvekloof, of which defendant owns a fifth; that this stream flows down and over defendant's other farm, Le Plaisir Merle, and the farm of one Du Preez, and thence down to and over plaintiffs' farms; and that they the plaintiffs have acquired by prescription a right to the exclusive use of this stream for domestic and irrigation purposes; but that between 15th and 20th January last the second defendant as tenant of the first defendant's farm, Le Plaisir Merle, deprived plaintiffs of this water for all these purposes, and that first defendant then claimed the right to divert it for purposes of irrigation. Wherefore plaintiffs claim an order giving them the exclusive use of this water and interdicting defendants from using any portion of it. Failing this, an order interdicting defendants from diverting so much of the water as to deprive plaintiffs of water for domestic and irrigation purposes. There is no mention in this declaration of the quitrent farm The Annex, through which this stream also runs, and whence alone any of this water was diverted by second defendant. Nor is there any allegation that plaintiffs rely on grant as well as prescription. Nor is there a distinct allegation of any invasion of plaintiffs' rights as riparian proprietors. The third prayer, for damages against the second defendant may therefore be regarded as damages claimed for invasion only of plaintiffs' alleged monopoly, based upon prescription, and its invasion by defendants seems also to be the foundation upon which plaintiffs applied for and obtained an interdict, the costs of which also await our determination. In their pleas, first defendant admits that he claims the right to divert the water for purposes of irrigation, but denies that the stream flows over Kunenberg, and alleges that he is the owner also of the farm Annex, over which this stream flows, and that both defendants are entitled to use the water so flowing over both farms for purposes of irrigation, but that it has only actually been used for the Annex. The plea proceeds to add that for a period far longer than that of prescription, defendants and their predecessors in title have uninterruptedly, openly, as of right, and adversely to plaintiffs and their predecessors in title, used and enjoyed the stream for irrigation purposes, but always allowed enough to flow "for the domestic and ordinary uses of places over which the stream runs." This addition of adverse user is then embodied in a claim in reconvention, in which the defendants claim damages against plaintiffs for having, on 20th February last, obtained from

this Court an interim interdict restraining defendants from using, diverting, and interfering with this stream. Damages in reconvention are claimed in consequence, as well as an order that, as against plaintiffs, defendants are entitled to use the water in this stream for irrigation and other purposes. But for this allegation of adverse user and defendants' claim in reconvention, it might have been inferred that defendants only resisted plaintiffs' claim of monopoly, but defendants' counsel has during the course of the case reasserted a right in defendants to exclude plaintiffs from all right to water from this stream for irrigation purposes. It becomes, therefore, necessary to deal with defendants' claim to exclude plaintiffs from all right of using the water for irrigation purposes. The circumstances in evidence are these: On the slopes of Simonsberg, in Paarl district, two perennial streams (one known as Groot River, the other as Middle River) have their source, and find their way, side by side, in separate natural channels, on to and through the quitrent farm Wolve Kloof. From Wolve Kloof they continue to pass side by side on to the first defendant's adjoining farm, called The Annex, and thence into his freehold farm Plaisir Merle, granted in 1694. There they, for the first time, meet, and in one natural channel (by one witness called Simonium, but generally known as Groot River) pass through the adjoining farm Rust-en-Vrede, thence across a corner of farm Zion into Du Preez's farm Watervliet, from which it crosses into plaintiff Marais' farm Ongegund. There it joins the Berg River, which passes through the farm Kunenberg, now owned by and divided among the three other plaintiffs. On Kunenberg and Ongegund the several plaintiffs have gardens, orchards, and cultivated lands. These cannot be watered by means of furrows taken out on the farms themselves from either the natural bed of Groot River or of Berg River. They are watered by water leadings from small dams erected on each property along an artificial furrow constructed partly on Kunenberg, partly on Ongegund, and partly on Watervliet, where that furrow is fed from water from a dam on Watervliet, constructed in the bed of the Groot River with the consent of a former owner of Watervliet. This dam and this furrow were put up more than 100 years ago, and have ever since continuously conveyed the Groot River water, which has been used by the various owners of plaintiffs' lands both for domestic, drinking, and irrigation purposes. From records of proceedings of the Court of Landdrost and Heemraden during the years 1786, 1806, 1812, and 1819 it appears that the proprietor of Watervliet,

"after having previously, according to the contents of his chart and title, made a proper use of this river and watercourse for the irrigation of his garden and vineyards, consented to let it run down in its entirety through a furrow to be made alongside this dam." It does not appear that since that time the owners of Watervliet have used any of the water coming to that dam. Their wants seem to have been supplied from another stream. That farm has been since subdivided, but an owner of part, who was a witness before the Court, does not appear to consider that his property has lost all right to use part of the Groot River water. The evidence before us, however, satisfies us that the Groot River has been diverted at that dam, and taken and flowed along the furrow as its constant channel through plaintiffs' farms for more than a third of a century, so that the present furrow has taken the place of the natural channel. It is in evidence, moreover, that on the original diagrams accompanying the grants of Wolve Kloof and Annex, both dated 15th September, 1819, the words "watercourse for Kunenberg and Ongegund" appear on the course of this stream, thereby indicating that at least some portion of that water was regarded as belonging to these farms. It has been contended for the defendant that the case of *Myburgh v. Van der Byl* does not apply to at least the farm Kunenberg, inasmuch as in that case the owner of the lower farm was entitled to part of the water as a riparian proprietor, and was only aided by the artificial channel to secure what was his own. Even if that had been the principle upon which that case was decided, it might apply to the present case, seeing that Kunenberg, by means of this furrow, only got so much Groot River water as would have run down from this river into the Berg River, on which it had riparian rights; but the ruling in that case shows that an artificial channel may, after the stream has been diverted into it and used as of right for the period of prescription, take the place of the natural watercourse, and that those on its banks acquire riparian rights. The plaintiffs having some right, we now approach the real issue which induced the interdict and this action namely, whether the plaintiffs' farms have acquired a monopoly. This monopoly they did not attempt to claim over any portion of the water of Middle River. To that water plaintiffs say they have no right whatever. It is moreover in evidence that for a period far longer than of prescription the whole of that stream has as of right been monopolised and controlled by the owners of Plaisir Merle and Rust-en-Vrede. In support of their claim to this monopoly plaintiffs rely on the words in

the original diagram of Wolve Kloof and the Annex written over the course of Groot River, viz., watercourse for Kunenberg and Ongegund. There is moreover in the original grant of Wolve Kloof a provision that the watercourses are to run free and undisturbed. This last provision may indicate that the owners of Wolve Kloof cannot exercise complete riparian rights over these waters. The nature of that ground moreover indicates that it could only be used as a grazing farm or a commonage to five neighbouring farms, to the owners of which was granted a fifth undivided share of Wolve Kloof. But there is nothing in the body of the grant of the Annex prohibiting its owners from interfering with the flow of that watercourse in its passage across the Annex. The absence of such provision in the diagram of Annex, framed by the same surveyor who framed that of Wolve Kloof, and issued at the same time, is strong evidence that the owner of Annex was not prohibited from diverting or using the water. The absence of mention of Annex in connection with Kunenberg and Ongegund on the diagram of Wolve Kloof, it is however argued, shows that Groot River was intended solely for Kunenberg and Ongegund. If this contention be correct, Watervliet, as well as other lower proprietors, who are not before the Court, would be shut out from use of this water; but the more direct answer to this contention is that the Annex is not mentioned on the Middle River watercourse in the diagram of Wolve Kloof in connection with Plaisir Merle and Rust-en-Vrede, and would therefore be excluded from enjoyment of any water for irrigation purposes from either of the two perennial streams running through it, which is contrary to the condition in the body of the grant of Annex that the owner was bound to have the ground brought into such cultivation as it is capable of within three years. The plaintiffs reply that, inasmuch as on the course of the Middle River on the diagram of Annex no direction as to what it is intended for appears, the defendants could use that watercourse; but this argument is opposed by the difficulty that the watercourse for Plaisir Merle and Rust-en-Vrede on the Wolve Kloof diagram indicated cannot by the words in the body of that grant be disturbed and would, if plaintiffs' argument be correct, be limited to those two places. The plaintiffs try to escape this dilemma by saying that Annex was granted to the owner of Plaisir Merle, and was therefore treated by the Government as one with it, and that wherever Plaisir Merle was mentioned on the Wolve Kloof diagram it included Annex. Seeing, however, that the Annex was a distinct grant, we cannot come to the conclusion either that

Annex was intended to be included in the term "Plaisir Merle," or that it was excluded by any of the words on it, or the Wolve Kloof diagram, from using the water of either stream during its passage through Annex. It is in evidence that on no portion of Annex itself could the Middle River be taken out for the purpose of irrigation except where it had by prescription, and before 1819, been monopolised by Plaisir Merle and Rust-en-Vrede, and that the only means of securing any water from that stream for irrigating any portion of Annex is by cutting a furrow from the watercourse on Wolve Kloof, the grant of which in its body prevents this. This is an additional argument in support of the conclusion we have arrived at that the writing on the diagrams of Wolve Kloof and Annex are merely indications of the uses to which the waters had in part applied before 1819, but can in no way interfere with the riparian rights of Annex. These can only be disturbed by adverse user. Possibly the words on the diagrams may have influenced some of the owners of Annex, and created doubts in some of their minds as to what their riparian rights were. This may possibly account for some of the evidence which has been led by plaintiffs as to the expressions and conduct of some of the owners of Annex. But it is clear that to succeed the plaintiffs must not merely prove that these owners have not used the water, but that they have during the period of prescription by acts adverse to any right in the owners of Annex, asserted their exclusive right to this water, and that these owners have continuously yielded to that assertion during a period of prescription. The evidence for plaintiffs in support of prescription endeavours to establish adverse user yielded to from 1850 to 1881. From 1850 to 1878 it is in evidence that one Hugo, since deceased, was proprietor, and Hugo's son, who was born in 1854 and lived there till his nineteenth year, says that "my father, as far as I recollect, never used the Groot River water. my father used the mill stream," and he thinks that his father did not think that he had a right to use the Groot River. But as young Hugo went regularly to school at Simonia, and apparently had nothing to do with farming work, he can give us little information as to what his father did on the farm. That 40,000 bricks were made by direction of his father from water led out of the Groot River during that time is clear from other evidence. Peterson, who lived there in Hugo's time, also says that he never saw Hugo use the water from the Groot River, but that he himself had gardens which he watered from the mill stream. The affidavit of Luttig is also to the effect that Hugo told his servants that the

water belonged to the lower farms, and there is other evidence which goes to show that Hugo told them not to touch the water. On the other hand, we have the positive evidence of Pepler, who knew the property more than thirty years ago, and who resided temporarily on Plaisir Merle, while he hired grazing rights from Hugo over part of Wolve Kloof and Annex, and he says that he himself saw Hugo use the water taken from the Groot River by means of a furrow on to Annex, and then he (Pepler) diverted the water into vley ground on Annex to improve his grazing. Also that bricks were made for Hugo with water led out of that river. Another witness named Syster (who also lived on Annex for a short time) says that he was instructed by Hugo to make bricks with Groot River water, and that he did so for upwards of a month in 1860. Syster was also present when some of the owners of plaintiffs' farms during dry seasons came to speak about water to Hugo, who allowed them to have some as a concession only, but not as a right, after he had himself used what he wanted. Solomon Laurens, who lived there in Hugo's time, used the Groot River water for gardening purposes with the knowledge and approval of Hugo. If these witnesses are truthful, and we accept them as such, it is impossible to come to any other conclusion than that Hugo not only did not yield to any claim by the owners of the lower farms to an exclusive use of the water, but resisted it by his own and his servants' repeated acts. It is unnecessary therefore to deal with the evidence relating to the period from 1873 to the present time, but this evidence is even less favourable to plaintiffs, and it is clear that from 1887 to 1890, when Haupt was proprietor, he not only asserted a right to use the Groot River water, but actually himself claimed a monopoly to it for irrigation purposes. The evidence, however, shows that since the occupation by defendants they have not acted in such a manner as to deprive plaintiffs of their riparian rights. Indeed, but for the claim in reconvention and counsel's contention in support of defendants' right to exclude the plaintiffs from all use of the water, we would not have regarded that there was any intention on the part of the defendants to deny the plaintiffs' riparian rights. The plaintiff Marais himself says that from 1893 to 1895 their usual supply was not in any way interrupted. In January of this year, however, there was an interruption at a time when, during a very dry season, water was very scarce. This caused plaintiffs to assert their right to prohibit defendants from all use of the water, and on asserting this exclusive

right the interim interdict was obtained, by which defendants were in February last shut out of their riparian rights, for which they now claim damages. The damage caused to plaintiffs by this January interruption is variously estimated by several witnesses. It would, if plaintiffs had succeeded in establishing a right to a monopoly, have not been assessed at more than a nominal sum. But this estimate of damage by witnesses is based upon the assumption that plaintiffs were monopolists, and as no damage to plaintiffs as riparian proprietors is distinctly alleged or proved to have resulted from the January interruption, we can allow none. Invasion of plaintiffs' claim to a monopoly of the Groot River being the main issue in dispute and the sole issue upon which they claimed and obtained an interdict. We give judgment for the defendants in convention, and order the plaintiffs to pay costs in convention as well as the costs of interdict. Although we are of opinion that plaintiffs have rights to water, both for domestic and irrigation purposes, the circumstances of this case do not justify us in granting the alternative interdict claimed by the plaintiffs. On the other hand, defendants have failed to substantiate their claim in reconvention, which their own counsel has construed into a claim to deprive plaintiffs of all right to the water. This claim is possibly the result of plaintiffs' proceedings, but is certainly unwise. It is not proved, and must be rejected, and justify us in rejecting any claim for damages arising from the interdict. We give judgment for defendants in reconvention with costs. What those costs are the Taxing Officer will have little difficulty in ascertaining when we say the defendants' personal evidence disproves the claim. Although both attempts to secure a monopoly of the Groot River water are by these judgments defeated, we make no order as to the distribution of the water. Such an order is not invited by either party, and if invited would scarcely be possible without notice to all those who might possibly claim to have riparian rights. There should, however, be no difficulty in distributing the water between the parties in dispute in a manner which ought to be satisfactory to both, and this could be done by their adopting the suggestion thrown out by me during the course of the case, and to which both parties seemed to assent.

Mr. Justice Upington said: This case raises questions of grave importance, and, therefore, I add a few words to what has been so well laid down by my brother Barry. Although the declaration has not clearly claimed a servitude by grant, the Court, after the elaborate argument

on that subject, should not hesitate to pronounce an opinion upon it. In my judgment the plaintiffs have failed to show any right derivable from grant. The words placed on the diagram of what, for convenience sake, may be called "the Annex," could not alone create so burthen-some and unusual a restriction on the ordinary rights of landed property as complete deprivation of common law riparian rights. Neither is it possible to restrict such rights by reference to the grant and diagram of Wolve Kloof, for even if the fullest weight is given to the language of that grant and diagram (including the reference to Mr. De Villiers' land under request at the time), I think the absence in the grant of the Annex of any provision such as that contained in the grant of Wolve Kloof, of even date, to the effect that the watercourses shall run undisturbed, outweighs any inference—for inference it can only be—that a definite distribution of the water supply was made at the time. The title really set up by the plaintiffs in their declaration seems to be alone that of prescriptive right to the whole supply of the Groot River. In the assertion of this right the words relied upon as constituting a grant would have been of value to them in conjunction with clear evidence of user by the predecessors in title of the plaintiffs from the date of the grant of the Annexe, but practically no clear evidence—certainly none to satisfy me—has been given to show the user of the water of Groot River before the ownership of Mr. Hugo, sen. In dealing with that ownership I hold it to have been clearly proved that the then owner used the water of the Groot River for irrigation purposes. I find myself unable to set aside the evidence of Mr. Pepler and of Syster. The evidence of adverse user since that time is to my mind quite too unsatisfactory to justify me in acting upon it. I am, consequently of opinion that the plaintiffs have failed to support any title by grant or by prescription to exclude the defendants from the use of any water on the Annex. Then arises a third question which again has not been raised upon the pleadings save by implication from the second prayer of the declaration, and which should properly be taken to be based upon the title relied upon in the declaration wherein no reference whatever is made to the common law rights of the plaintiffs as riparian proprietors. I do not hesitate, however, to deal with the question and to express my opinion that the artificial channel from the dam S has acquired the attributes of a natural channel. In coming to that conclusion I do not lose sight of the weighty argument that ordinarily it can only be between persons who are riparian proprietors

that to such an alteration can be given the shield of prescription, but looking at the notice given by the words on the diagram of the Annex and the subsequent user—to the knowledge of the defendants and their predecessors—of that artificial channel the defendants cannot now be allowed to say that no portion of the water should be allowed to reach the plaintiffs through the watercourse from S. Assuming that the plaintiffs are riparian proprietors by means of that channel, I am not satisfied that they have shown that an unreasonable use of the water of the Groot River was made by the defendants at the times complained of. In such cases evidence of damage is generally exaggerated, and I think it has been largely so in this case on both sides. In my opinion, for these reasons, the judgment of the Court should be for the defendants in convention with costs, including the costs of the interdict proceedings. The claim of the plaintiffs in reconvention to have the whole water of the Groot River is equally groundless. I doubt if they ever intended to assert such a right by their claim in reconvention, and the evidence of the defendant J. F. Baartman shows that he recognised some right in the lower proprietors by allowing half the water to run down while he was irrigating. Yet to my surprise the defendants were so unwise as to instruct their counsel in court to press for the whole of the water. If they had not done so, but had accepted the position of riparian owners I should have held the view that the plaintiffs in reconvention were clearly entitled to all their costs, but under the circumstances I am bound to hold that the claim in reconvention, as interpreted by the plaintiffs in reconvention themselves, has failed, and that judgment must be for the defendants in reconvention with costs. I fear that from the frame of the judgment, which must necessarily be upon the pleadings, there will be further difficulty between the parties unless an arrangement be come to as to what is a reasonable riparian use of the water on the Annex, but we can only decide upon the pleadings and between the parties to the suit.

Mr. Searle said he understood that the judgment would not debar the plaintiffs from taking further action if their right as riparian owners of the stream was questioned.

Their Lordships: Clearly not.

[Plaintiffs' Attorneys, Messrs. Scanlen & Syfret; Defendants' Attorney, C. C. de Villiers.]

ESTATE OF P. J. DU TOIT. } 1895.
June 28th.

Mr. J. T. Molteno applied for the appointment of a provisional trustee in the estate of Peter J. du Toit, of Murraysburg, whose estate had been accepted that day. The assets were largely live-stock, and it was necessary for the appointment to be made, and he applied that Mr. Alex. Innes be appointed.

Mr. Buchanan applied, on behalf of other creditors to the one represented by Mr. Molteno, for the appointment of Mr. A. E. Kidd.

Mr. Alex. Innes was appointed the provisional trustee in the estate.

MEYER V. MEYER'S EXECUTORS. } 1895
May 3rd
Will — Construction — "Sons" — "Grand-sons."

Husband and wife, by their mutual will, appointed each other reciprocally, together with their children as the heirs of all their property "to be relinquished on demise," on certain conditions including the following: that "all our fixed property be bequeathed to our sons jointly or their lawful representatives in order at their majority or marriage to make a joint use thereof with the survivor," and that "after the death of the survivor our joint fixed property shall be put up to auction among and for the benefit of our sons collectively, the amount whereof shall be equally divided among all our children collectively or their representatives per stirpes, with this understanding, however, that to each of the stirpes sons as well as daughters who shall not attain to any share in these places, whether by bequest or by sale, a sum be secured of at least £200 which shall have to be paid out to them at the death of the survivor by the sons who come into possession of the places":

Held, that upon the death of the surviving testator only his sons, and not his grandsons, were entitled to bid at the sale by auction of the land.

There is no rule that the term "sons" includes grandsons of the testator, but the questions whether grandsons are so included is one of intention to be gathered from the context and from the general provisions of the will.

This was a special case stated for the decision of the Court in the following terms:

1. The plaintiffs are Gert Hendrik Meyer, Helgard Pieter Meyer, and Helgard Pieter Meyer and are children of sons of the late Helgard Pieter Meyer and his spouse Catharina Elizabeth Meyer.

2. The defendants are John Cairncross and Stephanus Meyer, in their capacity as executors dative in the estate of the late Helgard Pieter Meyer, and the said Stephanus Meyer in his capacity as executor dative in the estate of the late Catharina Elizabeth Meyer.

3. On or about September 29, 1852, the said late Helgard Pieter Meyer (hereinafter called the testator) and Catharina Elizabeth Meyer (hereinafter called the testatrix) being married in community of property executed their mutual will, and in or about November 30, 1852, they executed a codicil thereto: the said documents together with translations thereof in the English language are hereunto annexed, marked A and B respectively.

4. The said testator died in or about January 27, 1853, and the said testatrix died in or about May 28, 1894, leaving the said will and codicil unrevoked and of full force and effect.

5. In consequence of the deaths of the executors named in the said will the defendants were appointed executors dative.

6. There were sixteen children issue of the said marriage, eleven sons and five daughters; all the said children survived the testator, but seven of the said sons died before the testatrix, and the plaintiffs are children of three of such sons. Each of the said sons also left children other than the plaintiffs; one of the said deceased sons became insolvent before his death and his rights under the said will and codicil were sold. The remaining four of the said sons survived the testatrix; certain of the said daughters, and their children also survived the testatrix.

7. The said last will and testament contained the following clauses:

Thirdly. That all our fixed property without any exception be bequeathed to our sons jointly or their lawful representatives in order at their majority or marriage to make a joint use thereof with the survivor of both of us testators, to whom during his or her life the enjoyment and possession are secured in the same way as they are exercised during our joint possession.

Fourthly. After the death of the survivor our joint fixed property shall be put up to auction by the piece or by the place among and for the benefit of our sons collectively, the amount whereof shall be equally divided among all our children collectively or their represen-

tatives *per stirpes*, with this understanding however, that to each of the *stirpes* sons as well as daughters who shall not attain to any share in these places, whether by bequest or by sale, a sum be secured of at least £200 sterling, which shall have to be paid out to them at the death of the survivor by the sons who come into possession of the places. By the provisions of the said codicil the amount of £200 directed to be paid as aforesaid was altered to £150. The other clauses of the said will and codicil it is not now necessary to refer to more particularly.

8. At the death of the testatrix there was property both movable and immovable belonging to the estate.

9. In or about December, 1894, the defendants acting as executors aforesaid put up by auction the immovable property on the said estate which was situate in the Mossel Bay district.

The plaintiffs attended the said sale and claimed to bid thereat.

The defendants refused to allow the plaintiffs to bid or any other persons save the four sons of testators who survived the testatrix. Thereupon the plaintiffs protested in writing to the defendants. The plaintiffs contend that they as grandsons of the testators are entitled as representing their fathers, sons of the testators to all the rights, privileges and benefits granted to their said fathers and are therefore entitled to bid at any sale of the immovable property in the said estate. The defendants contend (1) that none but four sons of the testators who survived the testatrix can bid as aforesaid, or otherwise (2) that if the estates of the seven predeceased sons are entitled to any right of bidding at the sale then said right must be exercised by the executors of the said sons and daughters respectively and not by the plaintiffs. Each party prays for judgment in accordance with its respective contention.

Clause two of the will was as follows:

Secondly. We nominate and appoint each other reciprocally—that is: the first dying, the survivor—together with our children begotten in (our) joint marriage, or their lawful representatives, as our sole and universal heirs of all our property to be relinquished on demise, nothing excepted, and such under the following conditions. (Then followed the conditions.)

Mr. Searle, Q.C., for the plaintiffs: It is submitted that any son of a deceased son can exercise all his father's right of bidding at the sale. Under clauses 3 and 4 of the will the grandsons are made legatees of the property, and under clause 2 they are made heirs. It is a fair presumption that the word "sons" used in the 4th clause of the will includes "grandsons." There is no authority directly in point, but see

Prætorius v. Executors of Prætorius (2 Juta, 298) and *Re Insolvent Estate of Beck* (1 Menzies, 332).

Mr. Rose-Innes, Q.C., for the defendants: The testators in their will frequently substitute the descendants of predeceasing children. See clauses 2 and 3. Under clause 4 of the will on the death of the survivor the property was to be put up to auction among the sons. From the use of the word "sons" in the first part of this clause it can be inferred that it was the intention of the testators to confer a personal right on the sons which they alone could exercise. No authority has been cited to show that in such a case the word sons includes grandsons. If the testators had so intended nothing would have been easier than to have said so. See *Human v. Human's Executors* (8 Sheil, 160). It is submitted that the right to purchase can only be exercised by the surviving sons.

Mr. Searle, Q.C., in reply.

De Villiers, C.J.: The governing clause of the will is the second: "We nominate and appoint each other reciprocally—that is: the first dying, the survivor—together with our children begotten in (our) joint marriage or their lawful representatives, as our sole and universal heirs of all our property to be relinquished on demise, nothing excepted, and such under the following conditions." The clauses which follow set out the conditions upon which the nomination of heirs had been made. The third clause provides "that all our fixed property bequeathed to our sons jointly or their lawful representatives." The words "lawful representatives" are here used specially to provide for the case of a son dying before either of the testators. The will proceeds: "in order at their majority or marriage to make joint use thereof with the survivor of both of us testators to whom during his or her life the enjoyment and possession are secured in the same way as they are exercised during our joint possession." So far the condition has provided for what is to be done with the fixed property until the death of the survivor. The object of the fourth clause is to provide a condition as to what is to be done upon the death of the survivor: "after the death of the survivor our joint fixed property shall be put up to auction by the piece or by the place among and for the benefit of our sons collectively." Now here I pause in order to point out that if it had been intended to give representatives of sons—as urged by Mr. Searle—similar advantages to those given to sons themselves then nothing would have been easier than to add "or their lawful representatives," as had been done in the third clause, but these words "or their

lawful representatives," are omitted. The will then proceeds: "the amount whereof shall be equally divided among all our children collectively, or their representatives *per stirpes*, with this understanding however, that to each of the *stirpes* sons as well as daughters who shall not attain to any share in these places whether by bequest or by sale, a sum be secured of at least £200 sterling, which sum shall have to be paid out to them on the death of the survivor by the sons who come into possession of the places." This sum was afterwards by the codicil reduced to £150. Now it is said, supposing all the sons were dead at the time of the death of the survivor, what is to become of this property? The answer is that the condition contained in the fourth clause would then fall to the ground, but so long as any sons are living those sons are the persons entitled to bid at the auction. Supposing that only one son is alive it is of course quite clear that he could not bid against himself, but he would simply take the property, but in order to claim the property he must pay some price and there is a minimum sum provided for, to be divided amongst all the

stirpes. The surviving sons are entitled to bid and get the property on payment of the highest price offered; the remainder, including the sons who do not acquire any property by purchase, the daughters, and the children of predeceased children of the testators, are entitled to their share of the purchase price. The context of a will might show that a testator intended to include his grandsons under the term "sons," just as in *Pretorius v. Executors of Pretorius* (2 Juta, 293) the term "children," as used in the context, was held to include grandchildren. In the present case, however, the specific provisions to which I have referred indicate an intention on the testators' part to confine the right of bidding for the land to the sons living at the time of the surviving testator's death, and that intention must accordingly prevail. The special case must be answered in terms of the defendants' contention (No 1). The costs must come out of the estate.

[Plaintiffs' Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendants Attorneys Messrs. Fairbridge, Arderne & Lawton.]

HEPWORTH & CO. v. COLONIAL GOVERNMENT.

The following is the full text of the judgment of the Privy Council reversing the decision of the Supreme Court of the Cape Colony :

(REPORTED 4 SHEIL 282.)

LORD HOBHOUSE: The question raised in this appeal was decided by the Supreme Court on a special case stated in the suit. The plaintiff (now respondent) is Receiver-General of the Revenue. The defendant (now appellant) is the agent in Cape Town of J. Hepworth & Co. (Limited), a joint-stock company, which has through the agency of the defendant carried on business there continuously since May, 1893. The plaintiff asserts, and the defendant denies, that the company is bound to take out a licence on which duty is payable at the rate of 1s. for every £100 of the subscribed capital of the company. That capital is £360,000, and the sum claimed is £360, being licence duty for two years.

The enactment under which duty is claimed is Schedule 17 of No. 3 of 1864, sections 2 and 5 of which originally stood as follows :

2. Every joint-stock company carrying on business in this colony shall annually take out a licence, for which there shall be payable for every £100 of the subscribed capital of such company 1s.

The term joint-stock company shall for the purpose of the above licence embrace :

(A.) Every company having a capital stock divided into shares, of which company the chief seat or principal place where its business is managed shall be within this colony.

(B.) Every such company, of which the chief seat or principal place where its business is managed shall not be within this colony, but of which any of the dealings shall, by the deed or other instrument regulating such company, be described as to be carried on in this colony. But the licence of any such last-mentioned company shall be reckoned upon one-half, instead of upon the whole of its subscribed capital.

5. When any joint-stock company, not being such a company as has been above described, but are doing business in this colony through the instrumentality of some agency in this colony, then such last-mentioned company shall annually take out a licence of the value of £50.

By subsequent Acts, No. 20 of 1884 and No. 38 of 1887, the second sentence of Head " B " and

section 5 have been repealed, and other provisions made. But these alterations of the law do not affect the question whether the defendant's firm falls within the terms of Head " B."

By their memorandum of association the registered office of the company is to be situate in England, and its objects are " to carry on in any part of the world the businesses " of clothiers, &c., and do certain subsidiary things " in the United Kingdom or elsewhere." There is nothing to indicate more specifically any place of business or dealing.

The Supreme Court have decided that the company so formed falls within Head " B." The opinion of the three learned judges who formed the Court is the most fully stated by Mr. Justice Buchanan the Acting Chief Justice. He says :

The issue narrows itself down to this. Can it be held that a deed of incorporation which authorises a joint-stock company to carry on business in any part of the world is an instrument in which the business of the company is " described as to be carried on in the Colony " ?

. I admit that the section must be strictly construed, but in my opinion it would be a straining of the rules of construction to say that the defendant company does not come within the section. The company is not acting beyond its memorandum of association in directly carrying on business in this colony. Having opened such a business here, and not merely an agency, we are, I think, bound to hold that the deed in authorising business to be carried on in any part of the world includes and describes this colony as a place in which such business is to be carried on.

Their lordships are unable to follow this reasoning. If the company's memorandum had been absolutely silent as to locality, it would not have been acting beyond it in directly carrying on its business in Cape Town, and yet to say in such a case that its business was described as to be carried on in Cape Town would be little short of an abuse of language. To say that a business is to be in a place named, is one thing. To say that it may be carried on anywhere, which of course includes every conceivable place, is a totally different thing.

It is true that the foregoing remarks only go to show how an ordinary reader of the memorandum would answer the question whether any of the company's dealings are described as to be carried on in Cape Colony ; whereas the controversy is, what the Cape Legislature meant

by those expressions. But on that point the plaintiff is in still greater difficulty; especially having regard to the wholesome maxim that the subject is not to be taxed under ambiguous expressions.

It appears to their lordships that Heads "A" and "B" are intended to serve as a definition or limitation of the general expression, "Every joint-stock company carrying on business in this colony." For though the Act uses the word "embrace," it is so obvious that the companies described in "A" and "B" must be embraced in the more general expression, that it would be idle to add two clauses for the purpose of saying that they are. The inference is that the draftsman has used inaccurate, but by no means uncommon, language; and has said only that the general terms embrace the specified particulars, meaning to say that they embrace no more. No company therefore is to be taxed under section 2 unless it comes within the terms of "A" or "B."

Many other companies doing business by agency must fall within the repealed section 5, as the defendant says that his company does. Whether that section was intended to include all company business not within "A" or "B," or whether, if so intended, it does include all, need not be discussed. Nor is the defendant bound to show for what reason, fiscal or political, Head "B" was enacted. It is for those who seek to tax him under that head to show that he falls within it. For some reason or other the Legislature have thought fit to make three divisions of companies: First, those who have their chief seat of business in the Colony, and who are taxed on their whole capital at the higher rate; secondly, those of which any of the dealings are described as to be carried on the Colony, who are taxed on their whole capital at the lower rate; and thirdly, those who, not coming under either of the above heads, do business in the Colony by some agency, and who are taxed at a fixed sum. According to the plaintiff's reasoning the second class comprises all companies not under Head "A," whose Charters do not preclude them from carrying on business in the Colony. To their lordships it seems reasonably clear that the second class is intended to comprise those only in whose constitution there is at least something specially pointing to the Cape as a place of

business. What kind or amount of indication would attract Head "B" cannot be decided beforehand. Each case must turn upon its own facts. In this case there is nothing whatever to indicate the Cape as a place of business any more than any other part of the world.

Furthermore, it appears that this point has already been the subject of decision in the Colony, in the case of *The Colonial Government v. British South Africa Company* (9 Juta, 280). In that case, the petitioners for a Charter stated that their object was to carry into effect certain operations, within a described region "or elsewhere in Africa." The Charter approves of the purposes of the petitioners, and empowers the company to acquire rights and property "in Africa," and to hold land and to establish "agencies in any of our colonies or possessions or elsewhere." The company made a railway in Cape Colony, and set up an office in Cape Town. The Treasury sought to bring them under Head "B." The judgment of the Supreme Court was delivered by Chief Justice De Villiers, who said that he could find nothing in the Charter which describes this colony as the place in which the business of the company is to be carried on.

Two of the learned judges who sat in that case sat also in the present case, but they do not address themselves to the question how it can be that Cape Colony is not indicated in the permission to carry on business in Africa, but is indicated in the permission to carry on business anywhere in the world. Mr. Justice Buchanan indeed appears to think that the ground of the earlier decision was the fact that the company was not carrying on business in Cape Colony. That, however, is not so. The Chief Justice did, it is true, think that such was the effect of the evidence, probably because the company had ceased to work their railway, but there was an express admission by the company that they were so carrying on business, and the judgment proceeded on that footing. The two decisions cannot stand together, and in their lordships' opinion the former is the right one.

The result is that their lordships will humbly advise Her Majesty to discharge the judgment appealed from, and to dismiss the action with costs. The respondent must pay the costs of this appeal.

DIGEST OF CASES

	PAGE
Administration account—Ordinance 104 — Extension—Costs. <i>Where an executrix, who had been in possession of an estate for five years without filing a final account, had been summoned by the Master under Ordinance 104, and in answer to the summons alleged inter alia that it was impossible for her to file the account until certain of the heirs had paid in moneys due by them to the estate, the Court, under the special circumstances of the case, granted the executrix an extension of four months within which to file the account, but ordered her to pay the costs of the application.</i>	
Master v. Louw's Executrix	149
Advocate — Admission — Graduate Cape University — LL.B. degree, Cambridge—Admission to the same degree Cape University—Act 16 of 1878, sections 8 and 20. <i>A graduate of the Cape University and an LL.B., Cambridge, admitted to the same degree Cape University, is entitled to be admitted as an advocate of the Supreme Court, although he has not been called to the English or Irish Bar, and is not an advocate of the Court of Session, Scotland.</i>	
Ex parte Krause	148
2. —Admission. <i>A barrister who applies to be admitted to practise as an advocate of the Supreme Court should be present when the application for his admission is made.</i>	
Ex parte Megone	148
Appeal — Privy Council — Charter of Justice, section 50. <i>Leave given to appeal to the Privy Council where the petition had been</i>	

	PAGE
<i>lodged with the Registrar and notice given to the other side within fourteen days from the date of the judgment, but no application had been made to the Court within the fourteen days.</i>	
Jones v. Town Council of Cape Town ...	172
Articled clerk — Admission—Error in certificates. <i>An articled clerk, who had served the full term of his articles, was admitted to practise as an attorney, where his certificates were made in respect of Bertie Brandon Davis, the applicant's real name being Brandon Herbert Davis.</i>	
Ex parte Davis	228
2. —Admission. <i>Where an articled clerk had served his articles for the first four and a half months with an attorney, and then acted as a Judge's clerk for twelve months, and served the remaining term of his articles with attorneys.</i> <i>Held, that he was entitled to admission.</i>	
Ex parte Hopley	228
Commitment to custody — Bail — War- rant. <i>A Magistrate, being satisfied from the examination of an insolvent that there was sufficient prima-facie evidence of his having committed culpable insolvency, in the interests of justice and with a view to further proceedings, ordered the insolvent to find bail without having previously issued a warrant for his apprehension.</i> <i>An application by the insolvent to have the proceedings set aside as being illegal was refused with costs,</i>	

	PAGE		PAGE
<i>the applicant being in no way prejudiced by the conduct of the Magistrate.</i>		up — Griqualand West Ordinance, No 16 of 1880, sections 6 and 7—	
Nel v. The Resident Magistrate of Worcester 153		Act 19 of 1883, sections 25 and 70 — Transfer of claims — Construction of Statutes.	
Costs—Summons—Withdrawal.		<i>The official liquidator of a Company, which at the date of the winding-up order was a lessee of claims in the Bultfontein Diamond Mine, is entitled to an order compelling the lessor to allow transfer and registration of such claims, although all the rents payable in respect of such claims have not yet been paid to the lessor. Different provisions in a Statute should, if possible, be so construed as to be consistent with each other, and therefore the privilege conferred upon certain classes of creditors of claimholders by the 25th Section of Act 19 of 1883 must be confined to cases to which the 70th Section does not apply. The priority which lessors enjoy under the 70th Section exists independently of the tacit hypothecation for one year's rent which as such lessors they are entitled to on the lessee's goods and chattels brought on the land.</i>	
<i>An informal summons in a Magistrate's Court having been issued, the case was withdrawn on the day of hearing, but no application was made on behalf of the defendant for his costs, and on the same day a fresh summons was issued.</i>		<i>The deed of lease authorised the lessee to transfer the claims during the term on condition that no such transfer should be made unless all rents should have been paid.</i>	
<i>On the day of hearing the second summons the defendant objected to the proceedings as his costs in the previous case had not been paid.</i>		Held, that this condition applied only to voluntary transfers.	
<i>The Court, on appeal, reversed the Magistrate's decision upholding the objections.</i>		London and South African Exploration Company v Official Liquidator North-Eastern Bultfontein and the Registrar of Deeds, Griqualand West 235	
<i>The case of Simpson & Co. v. Fleck (2 Menz. 255) commented upon and distinguished.</i>		Diamond mines—Maintenance of order and good government — Leases — Rent—Contribution payable.	
Marincowitz v. Matthys... .. 229		<i>Held, that the defendant company was not liable to pay a contribution to Government for the maintenance of order and good government in</i>	
Crown lands—Recovery of rent—Ordinance 9 of 1844—Civil Commissioner's writ.			
<i>Where there had been a return of nulla bona to a writ issued, in respect of rent overdue, by a Civil Commissioner under Ordinance 9 of 1844 and provisional sentence was afterwards prayed for the amount of the rent,</i>			
<i>The Court treated the matter as an illiquid case, granted judgment, and declared the property executable.</i>			
Colonial Government v Silo 209			
Culpable insolvency—Punishment.			
<i>A punishment of six months' imprisonment with hard labour may be passed in respect of each of the offences enumerated in the 71st section of the Insolvent Ordinance.</i>			
Regina v. Keyter 160			
Diamond mine — Claimholders—Lessor and lessee — Insolvency — Tacit hypothecation of lessor—Winding			

PAGE

respect of claims leased from which no rent had been received by the company

Colonial Government v. London and South African Exploration Co., Ltd. 194

Donation — Registration—Minor child
—Acceptance by father—Revocation
—Majority—Ratification.

Donations proper, as distinguished from remuneratory donations, require registration in the Deeds Office if they exceed the sum of £500 in value, and they are invalid and revocable to the extent of such excess, unless so registered.

A donation by a father to his minor child is completed by such registration whatever the amount may be.

An unregistered donation by a father to his minor child is not deemed to be complete without clear proof of acceptance by the child or by the father on behalf of the child.

Acceptance by the child alone is sufficient if he has reached the age of puberty, but if he is under that age, the gift must be accepted by the Court, the Master, or the father on his behalf.

Whether the minor be under or above the age of puberty the complete acceptance by the father would be sufficient, but such acceptance would be incomplete, as such, without some act done by the father to prove his intention to divest himself of the property, such as delivery to a third person, transfer in the Deeds Office, or, in the case of a cession of action, notice to the debtor of such cession to the child.

The plaintiff's father deposited the sum of £334 in her name in the Savings Bank at a time when she was still under twelve years of age and the Bank credited her with the amount.

Held that, as the Bank was authorised by law to receive deposits from

L 2

PAGE

parents on behalf of their minor children, the deposit by the plaintiff's father coupled with the receipt of the money by the Bank to her credit constituted a sufficient acceptance of the donation by the plaintiff's father on her behalf.

Before the plaintiff attained majority her father with her concurrence withdrew the money and dealt with it as his own, and after attaining majority the plaintiff and her husband for several years lived rent free in a house belonging to plaintiff's father, and received other benefits from him.

She became insolvent but did not claim the money, although if she had received the amount her estate would have been perfectly solvent.

No action was brought against the father during his lifetime, but after his death the present action was brought against his executor.

Held, that although the plaintiff's assent to the withdrawal did not prejudice her rights, her subsequent conduct amounted to a ratification of her father's revocation of his gift.

Slabber v. Neezer's Executors ... 189

Executor and trustee—Removal.

Where an executor testamentary and trustee applied to be relieved of his duties and trusts, on the grounds that owing to ill-health his medical advisers had recommended him to visit Europe, the Court relieved him from his office of trustee

Ex parte Michell. Re Blyth's Will ... 157

Habitual Drunkard—Liquor Act (1891), section 28 — Police Offences Act (1882), section 9.

Where a prisoner, who was charged before a Magistrate and found guilty of contravening section 9 of the Police Offences Act of 1882, had been during the twelve months preceding the date of his conviction

	PAGE
<i>three times convicted of drunkenness and once, within the same period, of contravening section 10 of the Police Offences Act of 1882, and was sentenced by the Magistrate to twelve months' imprisonment with hard labour under Act 25 of 1891, section 28,</i>	
<i>The Court, on review, quashed the conviction.</i>	
Queen v. Allies	185
Husband and wife — Edictal citation — Restitution of conjugal rights — Domicile — Jurisdiction.	
<i>Application by a wife to sue her husband by edictal citation for restitution of conjugal rights refused on the ground that neither the husband nor the wife had ever been domiciled here and the marriage had been contracted elsewhere.</i>	
Whipp v. Whipp	225
Insolvency — Proof of debt — Withdrawal without order of Court — Costs.	
<i>A creditor, who has proved a claim in an insolvent estate, may withdraw the claim without an order of Court, but he remains liable for his share of costs incurred bona fide by the trustee prior to the date of withdrawal.</i>	
Cressey and Others v. Haarhoff's Trustee	157
2. — Alleged sale — Pledge — Vesting.	
<i>Where certain movables, which were alleged to have been sold, but were really only pledged, by the insolvents in whose possession they remained, and which the Court found had never vested in the pledgee, were taken possession of by the pledgee after the insolvents had filed their schedules, Held, that the trustee was entitled to the value of the articles.</i>	
Heyneman's Trustee v. Loubser ...	185
3. — Election of trustee — Confirmation.	
<i>At a special meeting of creditors held before a Magistrate for the</i>	

	PAGE
<i>election of a trustee two creditors, each of whose claim was below £30, voted for O.</i>	
<i>One creditor, whose claim was below £30, voted for F.</i>	
<i>The Magistrate declared O. elected sole trustee, and the Court confirmed the appointment.</i>	
Re Du Toit's Estate	188
4. — Undue preference — General bond — Contemplation of sequestration — Onus.	
<i>Z., four months before his estate was sequestrated, and at a time when his assets exceeded his liabilities, passed a general bond in favour of L. & Co.</i>	
<i>In an action for undue preference instituted in the High Court of Griqualand West by Z.'s trustees against L. & Co., judgment was given in favour of the defendants, the Court, by a majority, holding that when Z., passed the bond he did not contemplate the sequestration of his estate.</i>	
<i>On appeal, the judgment of the Court below was sustained.</i>	
Ziegler's Trustees v. Liebermann, Bellstedt & Co.	230
Insolvent Ordinance — Section 106 — Discharge — Composition — Liability on preferent claims continued.	
<i>The Court, under the 106th section of the Ordinance, granted the discharge of certain insolvents who had entered into a composition with their creditors in terms of which they were to remain liable on the preferent claims against their estates.</i>	
Ex parte Rossouw. Ex parte Kay ...	211
Interdict — Watercourse — [Remedy by action.	
<i>The Court refused to grant an interdict restraining the respondents from constructing a dam and watercourse, leaving the applicants to their remedy by action.</i>	

	PAGE
Oppel and Others v. Le Roux and Others	151
Interpleader suit — Pledge — Goods attached, declared executable.	
<i>Where goods, which had been attached by a judgment creditor, were alleged to have been sold to one De J. by the judgment debtor, although in terms of the alleged contract of sale, they were to remain in the possession of the judgment debtor, and were actually in his possession when they were attached</i>	
<i>The Court, reversing a Magistrate's decision, held that the transaction between the judgment debtor and De J. was not a bona-fide sale, that it was a mere pledge, and that as the goods remained in the possession of the judgment debtor, they were liable to execution.</i>	
Friberg v De Jager	161
2. —Further evidence—Appeal.	
<i>Case remitted for further evidence as to ownership of property declared executable in an interpleader suit.</i>	
Koch v. Zackon	223
Liquor—Sale without licence—No evidence of sale—Conviction quashed.	
<i>V. was convicted by a Magistrate of contravening Act 28 of 1883, section 73, by selling liquor to one R. and others without having the licence required by law.</i>	
<i>There was no evidence whatever of the sale of the liquor; but V.'s wife admitted that she had given some sherry, which had been left at the house by a visitor some few days before, to two of the men..</i>	
<i>On appeal the conviction was quashed.</i>	
Regina v. Vedders	159
Lunatic—Summons—Cost of maintenance—Magistrate's duty in granting a reception order under Act 35 of 1891.	
<i>Where proceedings are taken against an alleged lunatic under detention to have him declared of unsound mind</i>	

	PAGE
<i>the summons should contain a specific allegation as to the previous judicial order under which he is detained. The Court, on being satisfied that a lunatic had property, ordered his curator bonis to contribute a certain sum per month out of the lunatic's funds towards his maintenance while under detention in a Government lunatic asylum.</i>	
<i>Before a Magistrate grants a detention order under Act 35 of 1891 he should inquire into the means of the alleged lunatic for the information of the Court or Judge before whom proceedings are subsequently taken.</i>	
Whelan v. White	226
Magistrate's Court—Rehearing of case.	
<i>In an application on behalf of the plaintiff, against whom judgment had been given by a Resident Magistrate's Court, for an order to compel the Magistrate to re-open the case on the ground that he had refused to hear certain witnesses produced on behalf of the plaintiff,</i>	
<i>Held, that the plaintiff ought to have tendered his witnesses for examination in the Court below, and requested the Magistrate to make a note of such tender, and that in the absence of clear proof of the Magistrate's refusal to take their evidence the application ought not to be granted.</i>	
Koch v. Zackon and the R.M. of Van Rbyn's Doip	155
Minor — Landed property — Sale by tutors dative—Transfer.	
<i>Tutors dative ordered to pass transfer to the purchaser of a farm, the property of a minor, the Court being satisfied that the price paid was fair and reasonable, and that the sale was to the interests of the minor.</i>	
Hayward v. Gerd's Tutors dative and Curator ad litem	207
Misjoinder — Exception — Summons — Declaration—Variance.	
<i>The defendants excepted to a declaration as being bad in law and</i>	

	PAGE
<i>embarrassing, on the ground that it is a misjoinder to join a cause of action against the two defendants as executors and individually and a second cause of action against one defendant individually in the same declaration.</i>	
<i>In fact, however, the declaration contained one count on a promissory note against the two defendants individually and a second count on a mortgage bond against the second defendant individually, although the first count in the summons was against both defendants as executors as well as individually.</i>	
<i>Held, that the exception to the declaration could not be sustained.</i>	
Van Noorden v. Van Zyl	165
Missionary Institution—Rules and Regulations—Magistrate's jurisdiction—Ejectment—Act 20 of 1856, section 10.	
<i>The rules of a Missionary Institution, which had been approved of by the Governor, provided in effect that a resident should forfeit his temporal rights at the suit of any of the missionaries, should it be proved to the satisfaction of the Magistrate of the district, that after reasonable warning, he persisted in disregarding the temporal regulations of the institution, and that his conduct and example tended to demoralise the inhabitants.</i>	
<i>Charges of intemperance and immorality having been proved against M., an inmate of the institution, in an action for ejectment brought against him by the resident missionary in the Magistrate's Court, judgment was given in favour of the plaintiff.</i>	
<i>M.'s right of occupation was of the value of £40.</i>	
<i>Held, on appeal, reversing the judgment of the Court below, that the Magistrate had no jurisdiction.</i>	

	PAGE
Matthys v. Henning	163
Prescription—Perennial stream—Artificial channel Riparian proprietor.	
<i>Two perennial streams, the Groot River and the Middle River, have their source in Simonsberg in the Paarl District, and flow side by side in separate natural channels on to and through the quitrent farm "Wolvekloof," of which B. (defendant) owns one-fifth.</i>	
<i>From "Wolvekloof" the streams flow on to the farm "Annex," and thence to the farm "Le Plaisir Merle" (both the property of the defendant), where they meet, and under the name of the "Groot River," flow in one natural channel through the adjoining farm "Rust en Vrede," thence across the farm "Zion" into the farm "Watervliet."</i>	
<i>The river then crosses into the farm "Ongegund," where it joins the Berg River which passes through the farm "Kunenberg."</i>	
<i>On "Ongegund" and "Kunenberg" (the latter now divided into three farms) K., and the other plaintiffs have gardens, orchards, and cultivated lands.</i>	
<i>These lands are watered by leadings from small dams erected on each property along an artificial furrow constructed partly on "Watervliet," partly on "Ongegund," and partly on "Kunenberg," the furrow being fed from a dam (S.) on "Watervliet," constructed in the bed of the Groot River with the consent of a former owner of "Watervliet."</i>	
<i>This dam and furrow were constructed more than 100 years ago and have ever since continuously conveyed the Groot River water, which is diverted at dam S., and which has been used by the various owners of plaintiffs' lands both for domestic and irrigation purposes.</i>	
<i>On the original diagrams accompany-</i>	

PAGE

ing the grants of "Wolvekloof" and "Annex," both dated 15th September, 1819, the words "watercourse for Kuuenberg and Ongegund" appear on the course of the Groot River, and in the original grant of "Wolvekloof" there is a provision that the watercourses are to run free and undisturbed, but there is nothing in the original grant of "Annex" prohibiting the owners of that farm from interfering with the water of the Groot River, whereas on the other hand it provides that "the grantee is bound within three years to bring the farm into such cultivation as it is capable of."

During the past 30 years the present owner of "Annex," and his predecessors in title, used portion of the Groot River for irrigation and other purposes, the remainder being allowed, with a few interruptions at different times, to flow down in its ordinary course.

Held, in an action by the owners of "Ongegund," and "Kuuenberg," against the owners of "Annex," in which both parties claimed the exclusive use of the Groot River, (1) that both claims had failed and (2) that the defendants had not acted in such a manner as to deprive the plaintiffs of their riparian rights.

Held, per Upington J., that the artificial channel constructed from dam S. had acquired the attributes of a natural channel.

Kobler and Others v. Baartman ... 241

Principal and agent.

The plaintiff gave to K. certain sums of money amounting in all to £1,000 for the purpose of advancing the same to the defendant upon security of a bond to be passed by the defendant, but K. only paid £291 to the defendant and appropriated the balance to his own use.

PAGE

Thereafter the defendant employed K. as his agent to borrow the sum of £1,000 on similar security and gave him a power of attorney to raise the money on mortgage but the name of the agent was left blank.

Held, that, in the absence of proof that the defendant had, before giving the power, authorised K. to receive any moneys on his behalf, the plaintiff was not entitled to recover more than the £291 paid on his behalf to the defendant.

Braude v. Executor of Verdoes... 184

Public body—Misfeasance Negligence—Damage—Municipal drain—Adoption of private underground drain.

The Town Council of Port Elizabeth, having statutory power to make and keep in repair the drains within the limits of the Municipality, constructed a drain into which surface waters collected from a considerable area flowed, and from which such waters were discharged into a surface drain in a private road belonging to H., but within the limits of the Municipality.

H., substituted a defective underground drain for such surface drain and, with the consent of the Town Council, connected it with the upper Municipal drain.

An obstruction having occurred in the lower underground drain owing to the gradual accumulation of gravel and débris discharged into it from the Municipal drain, the water was forced back and, escaping through the interstices between the bricks (which had been laid without mortar), penetrated underneath the foundations of the plaintiff's stores, into his stores and damaged his goods.

In an action against the Town Council for damages,

Held, that the adoption as part of the Municipal drainage system of a

	PAGE
<i>defective drain was as much an act of misfeasance as if the Town Council had itself constructed the drain, that the discharge of water and gravel into such a drain without the precaution of from time to time inspecting and, if necessary, cleaning it was an act of negligence, and that the Town Council was liable for damages which might reasonably have been foreseen as likely to be caused by such negligence.</i>	
O'Shea v. Town Council of Port Elizabeth	173
Sale — Postponement — Insolvent's interest in land.	
<i>Where the sale of an insolvent's interest in certain land had been postponed for three months by order of Court to enable an action to be instituted to set aside the sale of a life interest in the land, and at the expiration of the three months no action had been commenced, the Court refused to order a further postponement of the sale.</i>	
Strydom v. Strydom's Trustee	144
Tutors — Misconduct — Removal — Alienation of land—Jurisdiction of Eastern Districts Court—Ordinance 105, section 24.	
<i>In an application for removal of the tutors of a minor from their office on the ground that they had sold a farm belonging to him for less than its fair price, and had failed, within a reasonable time, to pay the purchase price received by them to the Master of the Supreme Court, Held, that inasmuch as they obtained the authority to sell from the Eastern Districts Court in the belief that such Court had jurisdiction and were afterwards directed by a Judge of that Court to let the order remain in abeyance, pending further inquiry, they were not guilty of such misconduct as would justify their removal. The Eastern Districts Court, as such,</i>	

	PAGE
<i>has no jurisdiction to authorise the sale of a minor's land not situated within the Eastern Districts</i>	
<i>Quære, whether a Judge of that Court has such jurisdiction under the 24th section of Ordinance No. 105.</i>	
Coleman v. Gerds' Tutors. <i>In re Gerds</i>	167
Usufruct — Lease — Sub-lease—Assignment of lease—Insolvency of lessee — Insolvent Ordinance, section 104 — Improvements—Tacit re-location. <i>A life usufructuary has no right to grant a lease extending beyond the period of his own life.</i>	
<i>The insolvency of a lessee puts an end to the lease, although the land may have been sublet by the lessee for the full period of his term.</i>	
<i>The insolvency of the lessee would not terminate the lease if, before the date of the insolvency, there had been a complete assignment of an assignable lease to a third party, but clear proof would be required that an absolute assignment was intended, and that due notice of the assignment had been given to the lessor.</i>	
<i>Where a lessor takes advantage of the law, which puts a premature end to a lease upon the insolvency of the lessee, he is liable, in the absence of any stipulation to the contrary, to the trustee of the lessee's estate for the value of improvements made by such lessee in contemplation of the lease being allowed to run for its full term and to a sub-lessee, to whom the lessee had legally sublet the land before his insolvency and who in contemplation of the lease continuing to its end had made such improvements.</i>	
<i>The mere receipt of rent by the lessor after the termination of the lease by effluxion of time, or by the operation of the Insolvent Ordinance, does not constitute a tacit re-location for the full period of the lease.</i>	
Parkin v. Lippert and Parkin	211

Will—Ordinance No 15 of 1845—Signature of testator.

An instrument purporting to be the last will of L. was written on more leaves than one and was signed at the foot by L. and witnesses but was signed only by the witnesses and not by L. on the first leaf.

The contents of the second leaf would be unintelligible without the first leaf.

Held that, as the first leaf was an integral part of the instrument, the second leaf could not be admitted to probate without the first, and that, as the first leaf was not signed by the testator, the instrument could not be accepted as a whole.

Ex parte Lloyd. Re Lloyd's Will ... 150

2. — Construction — "Sons" — "Grandsons."

Husband and wife, by their mutual will, appointed each other reciprocally, together with their children as the heirs of all the property "to be relinquished on demise," on certain conditions including the following: that "all our fixed property be bequeathed to our sons jointly or their lawful representatives in order at their majority

or marriage to make a joint use thereof with the survivor," and that "after the death of the survivor our joint fixed property shall be put up to auction among and for the benefit of our sons collectively, the amount whereof shall be equally divided among all our children collectively or their representatives per stirpes, with this understanding, however, that to each of the stirpes sons as well as daughters who shall not attain to any share in these places, whether by bequest or by sale, a sum be secured of at least £200 which shall have to be paid out to them at the death of the survivor by the sons who come into possession of the places":

Held, that upon the death of the surviving testator only his sons, and not his grandsons, were entitled to bid at the sale by auction of the land.

There is no rule that the term "sons" includes grandsons of the testator, but the questions whether grandsons are so included is one of intention to be gathered from the context and from the general provisions of the will.

Meyer v. Meyer's Executors ... 248



• **REPORTS OF ALL CASES**
DECIDED
IN THE SUPREME COURT
OF THE
CAPE OF GOOD HOPE,
DURING THE MONTHS OF JULY, AUGUST, AND
SEPTEMBER, 1895.
(WITH TABLE OF CASES AND DIGEST.)

REPORTED BY
J. D. SHEIL,
OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND ADVOCATE OF THE
SUPREME COURT.

VOL. V.—PART III.
(1895.)

CAPE TOWN :
PRINTED AND PUBLISHED AT THE "CAPE TIMES" OFFICE, ST. GEORGE'S ST
1895.

TABLE OF CASES.

	PAGE		PAGE
Abrahams v. Abrahams ...	354	Fittig v. Pedersen ...	256
Abrahamse v. Immelman ...	323	Fletcher & Co. v. James... ..	276
Albert District Gold Mining Co., <i>re</i> 262,	296	Fourie (Minors), <i>re</i>	286
Ashburner v. Ashburner ...	276	Fryer v. Louw's Executrix ...	313
Assman v. Rautman ...	286		
Associated Boating Companies v. Baard-		Garlick v. Mommen	290
sen. <i>Re</i> "The Leif" ...	338	Gie's Bond, <i>re</i>	260
		Glaesser's Executors v. Quiu's Executors	366
Baart v. Baart	266	Goldschmidt v. Botha	256, 257
Bader, <i>ex parte</i> ..	253	Gordon & Gotch v. Knight ...	366
Barrington v. Colonial Government ...	313	Grace, <i>ex parte</i>	366
Barry's Executors v. Bosman ...	366	Green v. Bradford	268
Bartrum, Harvey & Co. v. Murch ...	256	Green and Another v. Orsmond and	
Berning, <i>ex parte</i>	312	Another	367
Bertram, <i>ex parte</i>	368	Gush, <i>ex parte</i>	323
Bibby, <i>ex parte</i>	352		
Biccard's Trustees v. Visagie ...	323	Hall & Orsmond v. Fitzgerald ...	282
Birt and Close v. Jones's Executors ...	253	Hand & Co. v. Droomer and Another ...	338
Bosman & Co. v. Pease	366	" v. Lote	366
Botha's Trustee v. Buizien	256	" v. Millen	256
" v. Gray	298	" v. Thompson	256
Brewis v. Scott	360	Hayward v. Hayward	276
Britstown D.R. Church, <i>re</i>	286	Hearns v. Jackson's Executrix ...	275
Brookfield v. Brookfield	282	Helfrich's Executors v. Steyn ...	366
		Heugh's Trustee v. Heydenrych ...	327
Cape of Good Hope Bank (in liquida-		" Trustees v. Fry's Executrix ...	338
tion), <i>re</i>	313, 357	Hibernian Distilleries v. Crowder ...	275
Christie's Trustee v. Van der Spuy ...	366	Hodgson, <i>ex parte</i>	366
Cleghorn, <i>ex parte</i>	290	Horwitche's Trustee v. Twentyman & Co.	323
Cloete's Trustee v. Green	264		
Colonial Marine Assurance and Trust		Jacobus' Estate, <i>re</i>	327
Co., <i>re</i>	261	Jagger & Co. v. Levi	364
Colonial Orphan Chamber v. Boster ...	323	Joubert v. The Worcester Municipality	
Curtis, <i>ex parte</i>	290	and Colonial Government	303
Dearham v. Dearham	312	Judd (Minor), <i>re</i>	367
Demas v. Demas	333		
De Villiers, <i>ex parte</i>	323	Kent (Minor), <i>re</i>	358
Du Plessis, <i>ex parte</i>	367	Koch v. Zackon	299
Du Toit, <i>ex parte</i>	257		
Du Toit's Estate, <i>re</i>	353	Lamprecht v. Lamprecht's Trustee ...	361
Eaton, Robins & Co. v. Moller	256	Landsberg v. Dancer	256
Edmeades, <i>ex parte</i> — <i>re</i> Jeffrey's Will... ..	353	Lane, <i>ex parte</i>	366
Edmeades' Insolvent Estate, <i>re</i>	353	Lankester v. Morris	333
Engelbrecht v. Botha	366	Lazarus v. Levin	344
Erentzen v. Devlin	329	Leonard v. Van Niekerk	350
		Le Roux's Estate, <i>re</i>	276
		Liebetrau v. Liebetrau	284

	PAGE		PAGE
Lind v. Gibbs & Cooper	292	Schreiner and Silke, <i>ex parte</i> — <i>re</i> Reitz's	
Lynch v. Colonial Government 286, 327, 350		Will	367
Maguire v. Crofton	367	Schunke's Trustees v. Van Gass ...	275
Malan, <i>ex parte</i>	275	Scott v. Gillet	296
Marais, <i>ex parte</i>	366	„ v. McColla	352
Marais & Co. v. Beyers	319	Seaville v. Grobbelaar	276
Martell & Co v. Paarl Berg B.W. & S.		Serrurier v. Serrurier	354
Co.	330	Sharp v. Sharp	276
Master v. Hough's Executor	256	Siebenhagen v. Albertyn... ..	366
„ v. Pringle's Trustee	260	Sigcau v. The Queen	268
„ v. Turton & Nicholson's Trustee	260	Smith (Minors), <i>re</i>	258
„ v. Van Vuurens' Trustees	260	„ v. Momberg and Others	300
Maxwell, Earp & Co. v. Brink	256	Smuts, <i>ex parte</i>	275
McLeod v. Gedye	366	Somervell Bros. v. Cuthbert & Co. ...	266
Mendelsohn v. Judelsohn	256	Spolander, <i>re</i>	254
Midland Agency v. Burger	261	St. Leger v. Town Council of Cape Town	264
Mitchell & Co. v. Mocke... ..	366	Standard Bank v. Marais	364
Mostert v. Le Roex	323	Starck v. Starck	313, 353, 367
Murphy v. Murphy	260	Stofberg v. King	290
Myburgh v. Green	277	Strydom's Trustee v. Strydom	255, 292
Myburgh's Estate, <i>re</i>	367		
Neezer v. Neezer's Executors	350	Taysen v. Jonker	302
Nightingale v. White, Muller & Co. ...	367	Teubes v. Burger	275
		Theron v. Van Aarde and Another ...	338
Olivier v. Strydom	313	Thiele v. Daniels	259
Oosthuizen, <i>ex parte</i>	260	Thomas' Estate, <i>re</i>	286
Oudtshoorn Municipality v. Lind	363	Trollip, <i>re</i>	258
		Union Bank (in liquidation), <i>re</i>	255, 355
Parkin v. Lippert	257	Vallance, <i>ex parte</i>	285
Poppe v. Bate & Co.	367	Van Aardt v. Jefferson	350
Potgieter, <i>ex parte</i>	266	Van der Merwe's Estate, <i>re</i>	257
Preim v. Winter	331	„ Merwe v. Le Roux	364
		„ Walt v. Kruger, Pelser & Co.	263
Rautenbach v. Ferreira	276	„ Westhuizen's Trustee v. Steyn ...	313
Regina v. Albert	281	Van Os, <i>ex parte</i>	367
„ v. Roos	344	Van Renen v. Van Renen	333
„ v. Sigcau	290	Van Tonder's Estate, <i>re</i>	257
„ v. Tally September	263	Van Wyk's Estate, <i>re</i>	367
Renfrew v. Renfrew	281	Viljoen, <i>ex parte</i>	257
Ross, <i>ex parte</i>	256	Von Broembsen, <i>ex parte</i>	257
Rothenburg v. Rothenburg 255, 259, 303, 354			
Roussouw's Executor v. Olivier	323	Warren's Ante-nuptial Contract, <i>re</i> ...	276
Row's Executrix v. Dalton	256	Western Province Bank (in liquidation),	
„ v. Lamprecht... ..	256	<i>re</i>	313
		Willemse v. Willemse	318
Scheepers v. Scheepers	259	Willemse and Others v. Latagan ...	350
Schnitzler and Peycke, <i>ex parte</i>	312	Wilms, <i>ex parte</i>	257
Schonkin's Estate, <i>re</i>	313	Wolfe v. Wolfe	257
		Worcester Commercial Bank, <i>re</i>	355

CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT.

[Before Sir HENRY DE VILLIERS (Chief Justice), Sir JACOB BARRY (J.P., E.D.C.), and Mr. Justice UPINGTON, K.C.M.G.]

Ex parte BADER. { 1895.
July 2nd.

Mr. Benjamin moved that Mr. Ernest James Bader be admitted as an advocate of the Supreme Court, the oath to be administered before the British Resident at Pretoria.

The Chief Justice: Is it the intention of Mr. Bader to practise in the Supreme Court? It was laid down by the Court, when granting a previous similar application (*Ex parte Megone*, 5 Sheil, 142), that a barrister who wished to be admitted as an advocate of the Supreme Court should make at least one appearance in court if he thought it worth his while to be admitted.

Counsel informed the Court that he was not instructed as to where the applicant intended to practise. Presumably it would be in the South African Republic.

The Court granted the application.

The Chief Justice said: It is really a matter more of etiquette than of law. I should have thought that any advocate who wished to be admitted to the bar of the Supreme Court would have thought it only courteous to come here and take the oath before the Court. We expressed that opinion before, but possibly it was not brought to the notice of the applicant, and under these circumstances the Court will admit the applicant. But we wish it to be clearly understood that this admission is not to form a precedent in future cases.

BIRT AND CLOSE V. JONES'S EXECUTORS. { 1895.
July 2nd.
Aug. 5th.

Executors testamentary—Application for removal.

Where sufficient cause had not been shown for removing executors testamentary from their

trust the Court granted a rule nisi calling upon them to show cause why the estate should not be realised and accounts filed within three months from the date of the order.

This was an application for the removal of certain executors on the grounds of misconduct in the administration of the estate which they represent.

The applicants were Annie Maria Birt (born Jones) and Jessie Close (born Jones), two heirs of the late William Jones, senior.

The respondents were William Jones, junior, Philip Tipping Jones, and Henry Nash, who are the executors testamentary of the testator. William Jones, senior, who died at Port Elizabeth on 15th June, 1892.

The testator by his will appointed his three sons, two daughters, and the children of his third daughter (Mrs. Close) his heirs. Mrs. Close to have a life interest in her children's portion.

The testator possessed considerable property, but many years before his death his three sons (two of them being respondents in the present application) took over the business which he had carried on. The sons thereafter carried on business in Port Elizabeth, King William's Town, Graham's Town, and Kimberley, under different styles, and they became indebted to the Standard Bank, in whose favour they passed two bonds—one for £15,000 and the other for £5,000, and the father bound himself as surety on the bonds. At his death Jones senior left considerable landed property in Port Elizabeth which the executors were very slow in realising, and from the first the two sons had considerable friction with Nash, their brother-in-law, who was the third executor.

At the end of 1892, some of the heirs began proceedings to have the executors removed, but a compromise was effected, and an agreement was entered into by all of them on 16th December, 1892, indicating the manner in which the estate should be realised.

The applicants alleged that the respondents had not adhered to this agreement.

After the respondents had filed a liquidation account the Master sued them in October, 1894, to show cause why they should not file a further account.

The respondent Nash then appeared and took up the position that he was willing to finally liquidate the estate, but that his co-executors would not allow him access to the books and papers.

The Court ordered account to be filed with costs *de bonis* against the executors, and further ordered that Nash should be allowed to engage an accountant who should have access to the books.

Friction continued, and at the date of the present application the estate had not yet been administered. The chief debts had been paid and commission amounting to nearly £1,000 had been drawn by the executors, but the heirs had received nothing.

Under these circumstances the applicants asked the Court to remove the executors and that some impartial person might be appointed to administer the estate.

The secretary of the Guardian Company was suggested and he expressed his willingness to accept the trust.

Mr. Rose-Innes, Q.C., was heard in support of the application and relied on *Grobbelaar's case* (Buch. 1879, p. 207) and *Botha v. Meer* (Buch. 1877, p. 139).

Mr. Searle, Q.C., for the respondents.

The Chief Justice said: Sufficient cause has not been shown to justify the Court in removing the respondents from their trust, but a rule *nisi* will be granted calling upon them to show cause, on the 1st August, why the estate should not be realised and accounts filed within three months from date. As to costs, they had better stand over, much will depend on the conduct of the parties in the meanwhile. The Court is not prepared to say that the conduct of the respondents has been entirely free from reproach, as they had been dilatory in realising the estate. Three months should be quite sufficient to realise the estate, and the question of costs will stand over.

Afterwards, on the 5th August,

Mr. Rose-Innes, Q.C., moved to make absolute the rule *nisi* requiring the executors to realise all the assets of the said estate forthwith, and to file the final account of their administration thereof with the Master of the Supreme Court within three months from the 2nd July.

Mr. Searle, Q.C., for the respondents.

The Court made the rule absolute.

The Chief Justice said: The only question is that of costs. In my opinion the costs may fairly come out of the estate, but I do not wish

it to be understood that the Court believes that this estate has been well administered. In my opinion during the last four years these executors might have done a great deal more than they have done, but they seem to have quarrelled among themselves, instead of attending to the true interests of the estate. Up to this time they are still quarrelling, and I gather from these affidavits that the quarrel is to continue still about the amount of the commission which is to be paid. As that is the fault of all parties, I think it only reasonable that all should bear part in the costs of this litigation, which will be paid out of the estate.

[Applicants' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. Trollip & Hutton.]

Re SPOLANDER.

1895.
} July 2nd.
„ 12th.

Deaf mute—*Curator bonis*—Rule *nisi*.

Where there was prima facie evidence that a deaf mute was incapable of managing her affairs, the Court appointed a curator ad litem to assist her, and granted a rule nisi calling upon her to show cause why a curator bonis should not be appointed to manage her property.

This was the petition of Franciscus Hermanus Spolander, of Cape Town.

The petitioner is the executor testamentary of the estate of the late Petronella Jacoba Spolander, widow of the late Carel Pieter Spolander, and was duly appointed by letters of administration dated 2nd July, 1894. He is also the executor dative of the estate of the aforesaid Carel Pieter Spolander, duly appointed on the 28th September, 1894.

C. P. Spolander, who was a brother of the petitioner, died in 1876, leaving him surviving his wife P. J. Spolander, and one child, a daughter, named Christina Maria Johanna.

P. J. Spolander died in June, 1894, leaving her daughter C. M. J. Spolander surviving.

Spolander in his will instituted his wife and daughter his sole and universal heiresses and his wife by her will instituted her daughter her sole and universal heiress.

The assets in the estate amount to £200 in cash and immovable property valued at £2,410, which is unmortgaged and let at a good rental.

The daughter Christina M. J. Spolander, who is now 47 years of age, was born deaf and dumb, and possesses a certain amount of intelligence, but is incapable of attending to her affairs,

being unable to understand the relative value of gold and silver. She has resided with the petitioner since her mother's death, and it was her mother's wish that the petitioner should have the care of her person and property.

The petitioner alleged that it would be to the interest of Miss Spolander that a curator should be appointed to take charge of her person and property, and he expressed his willingness to accept the office.

The prayer was for the appointment of a *curator ad litem* to represent Miss Spolander in proceedings about to be instituted to have her declared incapable of managing her affairs, and to have a curator appointed to take charge of her person and property.

Mr. Maskew for the petitioner.

The Court granted a rule *nisi* calling on Christina M. J. Spolander to show cause on the 12th July, why she should not be declared incapable of managing her own affairs, and why Franciscus Hermanus Spolander should not be appointed curator of her person and property. Mr. Watermeyer was appointed *curator ad litem*, and directed before the return of the rule to interview Christina Spolander, and also inquire into the fitness of Franciscus Hermanus Spolander to be appointed curator.

On the return day the *curator ad litem* having reported that in his opinion Miss Spolander was incapable of managing her affairs, and that F. H. Spolander was a fit and proper person to be appointed curator, the Court made the rule absolute.

[Applicants' Attorneys, Messrs. Sauer and Standen.]

SUPREME COURT.

[Before Sir JACOB BARRY (J.P., E.D.C.) and
Mr. Justice UPINGTON, K.C.M.G.]

STRYDOM V. STRYDOM'S TRUSTEE. { 1895.
July 3rd.

Mr. Searle, Q.C., applied for an order further extending the period of an interdict restraining the sale of certain portions of the farm Zeekoe-river, in the district of Oudtshoorn, pending an action to determine the rights of the parties interested.

Mr. Innes, Q.C., and Mr. Juta, Q.C., for the respondent.

The application was refused with costs.

THE PETITION OF THERESA ROTHENBURG.

Mr. Buchanan moved for a rule *nisi* requiring petitioner's husband to show cause why she shall not be admitted to sue him *in forma pauperis* in an action for divorce by reason of his alleged adultery.

The order was granted, returnable on the 12th instant, personal service to be effected.

Re UNION BANK, IN LIQUIDATION. { 1895.
July 3rd.

Mr. Tredgold applied for the sanction of the Court to certain compromises proposed to be effected by the official liquidators with debtors and shareholders.

The following is a list of the compromises :

W. G. Dolman, a contributor on ninety-three shares and a debtor on bills and overdrawn account to the extent of £19,889 2s. 9d., against which the bank held certain securities. All the debts, assets, and securities have been sold under power of attorney to save expenses, realising £11,022 19s. 1d. and he now applies for full release. All his creditors have agreed to adopt this course.

Chas. T. Mills, a debtor on bills to the extent, or finally, of £18,289 2s. 0d., now reduced to £8,179 3s. 9d. exclusive of interest, offers to pay the balance of capital account due at once, in addition thereto ceding to the liquidators the right to receive from the estate of his late father Daniel Mills any further amount he may be entitled to therefrom, in addition to the balance of his estimated inheritance at this date should the Camp's Bay property held by the estate realise more than £10,000, the said property having been valued at £10,000 for the purpose of the compromise.

Francis G. Myburgh, a debtor on bills to the extent of originally £11,779 3s. 0d. now reduced to £9,172 17s. 11d. offers a payment of £150 and surrender of all securities held by the bank. The amount offered has been deposited with the liquidators.

The compromises were sanctioned.

SUPREME COURT.

[Before Sir HENRY DE VILLIERS (Chief Justice)
and Mr. Justice UPINGTON, K.C.M.G.]

MENDELSSOHN V. JUDELSON. } 1895.
July 12th.

Civil imprisonment—Insolvency.

The Court refused to grant a decree of civil imprisonment against a defendant who had given notice in the "Gazette" of his intention to surrender.

This was an application for a decree of civil imprisonment.

Judgment had been given against the defendant for £104 10s. 11d.

Execution issued and there had been a return of *nulla bona*.

The defendant had given notice of his intention to surrender but the ten days had not yet expired.

Mr. Close moved.

Mr. Searle, Q.C., for the defendant.

The Court made no order.

[Plaintiff's Attorney, D. Tennant, jun.; Defendant's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

ROW'S EXECUTRIX V. LAMPRECHT.

Mr. Castens applied for provisional sentence for the sum of £86 8s. 3d. on a mortgage bond, with interest at 7 per cent. from 20th October, 1886.

The order was granted, and the property made executable.

ROW'S EXECUTRIX V. DALTON.

Mr. Castens moved for provisional sentence on two mortgage bonds for £250, with interest at 7 per cent. from 1st July, 1893.

The order was granted.

ROW'S EXECUTRIX V. LAMPRECHT.

Mr. Castens moved for provisional sentence for the sum of £125 on a mortgage bond, with interest at 7 per cent. from 1st July, 1893.

The order was granted.

EATON, ROBINS AND CO. V. M. J. MOLLER, JUN.

Mr. Buchanan applied for the final adjudication of defendant's estate.

Order granted.

LANDSBERG V. S. J. DANCER.

Mr. Joubert moved for provisional sentence for £1,000 on a mortgage bond.

Order granted.

HAND AND CO. V. B. MILLIN.

Mr. Tredgold moved for judgment for the sum of £125 6s. 3d., and for provisional sentence on certain promissory notes amounting to £233 15s.

Order granted.

HAND AND CO. V. C. C. THOMPSON.

Mr. Tredgold moved for provisional sentence for £45 13s. 3d. on a promissory note.

Order granted.

GOLDSMITH V. J. H. BOTHA.

Mr. Close moved for provisional sentence for £180.

Order granted.

MASTER V. HOUGH'S EXECUTOR.

Mr. Giddy applied for an order to compel the defendant to file an account.

Order granted.

BARTUM HARVEY AND CO. V. MURCH.

Mr. Sheil moved for provisional sentence for £362 15s. 10d., due on an acknowledgment of debt, together with interest at 6 per cent. per annum from 15th November, 1894, and costs.

Provisional sentence was granted with costs as prayed.

BOTHA'S TRUSTEE V. W. C. BENZIEN.

Mr. Close applied for costs in the matter of two mules unduly retained by the defendant, but now handed over.

Order granted.

FITTIG V. J. C. F. PEDERSEN.

Mr. Jones moved for costs of suing on a promissory note.

Order granted.

MAXWELL AND EARP V. A. BRINK.

Mr. Buchanan moved for judgment under rule 329 for £272 6s. 9d.

Order granted.

REHABILITATIONS.

Ex parte DONALD DANIEL ROSS

Mr. Maskew moved for the rehabilitation of Donald Daniel Ross.

The order was granted.

WILLEM JACOBUS VILJOEN.

Mr. Buchanan moved for rehabilitation.
Order granted.

DANIEL CHARL STEPHANUS DU TOIT.

Mr. Close moved for rehabilitation.
Order granted.

Ex parte VON BROEMBSSEN. { 1895.
July 12th.

Insolvency—Release—Notice—Practice.

At the first and second meetings in an insolvent estate no creditors appeared and no trustee was elected.

Thereafter the insolvent applied for the release of his estate from sequestration.

The Court refused the application on the grounds that notice had not been published in the "Gazette" nor had an affidavit of full and fair surrender been filed.

This was an application for the release of the insolvent's estate from sequestration.

The Master certified that at the first and second meetings, no creditors appeared and no trustee had been appointed.

The Registrar refused to set the application down on the roll, as notice had not been given in the "Gazette" nor had an affidavit of full and fair surrender been filed.

Mr. Close moved from the bar and in support of the application relied on *In re Bomer* (1 Juta, 49), *In re Osborne* (not reported), and *In re Fry* (not reported).

The Court refused the application on the grounds that the usual practice of giving notice in the "Gazette" and filing an affidavit of full and fair surrender had not been complied with.*

GENERAL MOTIONS.**IN THE INSOLVENT ESTATE OF NICHOLAS W. J. VAN DER MERWE.**

Mr. Molteno moved for authority to the Master of the Supreme Court to call a special meeting for proof of debts and for the election of a trustee in the said estate, the trustee nominated at the second meeting having declined to accept the office.

The order was granted.

* Thereafter on 31st August, notice having been given and the affidavit filed, the estate was released.

IN THE MATTER OF THE MINORS WILMS.

Mr. Sheil moved for authority to the father of the said minors to sell certain pieces of land, their property, in the village of Middelburg, and to devote the proceeds to the building of a dwelling-house on another piece of ground, also the property of the minors, the land being at present unproductive, and the price offered for it a high one.

Order granted.

PARKIN AND OTHERS V. LIPPERT AND OTHERS.

Mr. Searle, Q.C., with whom was Mr. Sheil, moved for leave to the defendant Lippert to appeal to Her Majesty in her Privy Council from the judgment of this Court in the suit between the parties, and that execution be stayed pending the hearing of such appeal.

Mr. Innes, Q.C., for the plaintiffs in the action consented to the application providing that the rents be paid in to a receiver pending the result of the appeal.

The Court granted the order accordingly.

IN THE ESTATE OF JOHANNES J. VAN TONDER AND PREDECEASED SPOUSE.

Mr. Juta, Q.C., applied for authority to the executor testamentary to raise a sum of money on further mortgage of part of the farm Zee-koegat, in the district of Albert, for the purpose of satisfying liabilities of the joint estate and debts subsequently incurred, with a view of preserving the farm for the heirs.

Order granted.

WOLFE V. WOLFE.

Mr. Molteno moved to make absolute the rule nisi for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to her husband of his conjugal rights, and for an order giving the custody of the minor child of the marriage to the father, and declaring the respondent has forfeited all benefits under her ante-nuptial contract.

Order granted.

GOLDSCHMIDT V. BOTHA.

Mr. Close applied for an order authorising the attachment of certain landed property belonging to the respondent in the district of Fort Beaufort, in satisfaction of a judgment to be asked for this day, all his movable assets having been sold in execution at the instance of another creditor.

Order granted.

IN THE MATTER OF THE MINORS SMITH.

Mr. Close applied for an order authorising the tutor testamentary of the said minors to sell the shares belonging to them in certain landed property situate on the Hill, Port Elizabeth, the major joint owners being about to dispose of their shares, and it being expedient that the whole should be sold at once.

Order granted.

In re TROLLIP. } 1895.
July 12th

Wills Ordinance — Signature — Initials—
Testator.

A signature by means of the testator's initials is a sufficient compliance with the requirement of the Wills Ordinance that he shall sign his name.

The testatrix and witnesses duly signed at the foot of a will written upon more pages than one, but the only signature of the testatrix to the first leaf was made by means of her initials just above the initials of the witnesses, apparently made with the view of authenticating an erasure on the second page.

Held, that when once the genuineness of the initials was established there was a sufficient compliance with the requirement of the Ordinance that the testator and witnesses shall sign their names upon at least one side of every leaf.

In re Ebden's Will (4 Juta, 495) approved.

Van Vuuren's Case (2 Searle, 116) overruled.

This was an application by the executors testamentary appointed by the will of the late Belinda Trollip.

The will was executed on 18th April, 1892, and the testatrix died on the 2nd May, 1895.

The Master declined to treat the will as valid, or to issue letters of administration, on the ground that the will was not signed by the testatrix on the first leaf.

The will was written on two leaves of four pages. On the second page of the first leaf two erasures were made, and in the margin of the will appeared the initials B T, and underneath the initials of the two witnesses, apparently signed with the intention of authenticating the erasures.

At the foot of the will appeared the name of the testatrix written thus "B. Trollip," and underneath the names of the attesting witnesses H. W. Murray and Reg. Games.

The petitioners prayed for an order compelling the Master to recognise the will as valid and to grant the petitioners letters of administration.

Mr. Graham, for the petitioners, after referring to the judgment of Bell J. in *Van Vuuren's Case* (2 Searle, 116); *Troost v. Ross* (4 Searle, 211); *Re Le Roux* (3 Juta, 56), and *In re Ebden's Will* (4 Juta, 495), was stopped.

The Court granted the application.

The Chief Justice said: The Master acted quite correctly in refusing to accept this will, for he could not have recognised it consistently with the decision of a majority of this Court in *Van Vuuren's case* decided in 1855 (2 Searle, 116). The Court has now to determine whether the decision in that case that a signature to a will cannot be made by means of initials is to be upheld. If there had been no subsequent decisions of this Court which are inconsistent with *Van Vuuren's case* I should have hesitated, after the lapse of thirty years, to overrule it, however much I might doubt its correctness. It must be borne in mind that the decision was dissented from by Mr. Justice Bell, whose reasons for differing are given in full whereas the reasons of the other two judges are very curtly stated. To my mind the reasoning of Bell J. is conclusive. In the subsequent case of *Troost v. Ross* (4 Searle, 211) a will signed with the mark of the testatrix and attested by two witnesses was held to have been duly executed within the meaning of Ordinance No. 15 of 1845. The Judges in that case were unanimous and their judgment cannot be reconciled with *Van Vuuren's case*. If a mark is a sufficient signature, *a fortiori* initials must be sufficient. The authority of the case of *Troost v. Ross* was recognised in the later case of *Re Le Roux* (3 Juta, 56). Under these circumstances the Court is now perfectly justified in reconsidering the correctness of the decision in *Van Vuuren's case*. It was there pointed out that although the Ordinance only requires that the will should be signed at its foot, it provides that where the instrument is written upon more pages than one the testator and witnesses shall "sign their names" upon at least one side of every leaf. I agree with Bell J. that it was not intended to make any difference between the modes of signing the different parts of the will. The only question is whether the requirement of the Ordinance is complied with by a signature by means of initials. The requirement is that the testator and the witnesses shall "sign," not write,

their names. What is the original meaning of the term "sign"? It is a "mark" from the Latin *signum*. To sign one's name, as distinguished from writing one's name in full, is to make such a mark as will represent the name of the person signing the document. For that purpose it is no more necessary to write one's surname in full than it is to write one's Christian names in full. Of course it is in every case advisable that the ordinary signature of the testator and witnesses should be used, and if this is not done, the Master would be justified in throwing the burden of proving the authenticity of the will on those who produce it. If he is not satisfied with this proof he may leave it to them to establish the will by action. But if, as in the present case, he is satisfied with the genuineness of the signatures, the fact that the testator or witnesses signed their names by means of initials should not prevent him from accepting the will.

In the present case the testatrix, Belinda Trollip, signed the will in question at its foot as "B. Trollip." No one disputes the correctness of that signature although she gives only the initial of her christian name. The same remark applies to the attestation of the witnesses who write their surnames in full but only the initials of their christian names. But the will is written on more pages than one, and on the side of the second page of the first leaf—but not at the foot—appear the initials of the testatrix and of the witnesses, written apparently with the view of authenticating an erasure made on that page. Are these signatures to be accepted as sufficient to authenticate the whole of that leaf? In my opinion if the signatures are genuine—and no doubt is cast on their genuineness—they serve to authenticate the whole leaf. The testatrix and the witnesses have complied with the Ordinance by "signing" their names on one side of the leaf and the Court has no right to set aside the will because, in its opinion, the signatures were made with a view merely of authenticating a particular erasure. In *Ebden's case* (4 Juta, 495), the will had been duly signed at the foot, but the only signature of the testator to the first leaf was in the body of the will, he having written the will himself and filled in his name at the beginning. His object in so doing was probably not to comply with the requirement of the Ordinance but the Court held that, as he did in fact so comply, the will was properly executed. In my opinion the will now in question ought not to be rejected because of the signatures having been made by means of initials. In this, as in every case of a similar kind, it is a question of evidence, but, if all doubt

as to the genuineness of the initials is removed, the will is as valid as if the names had been written in full. The application must be granted but the costs may come out of the estate.

Mr. Justice Upington concurred.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

ROTHENBURG V. ROTHENBURG.

Mr. Benjamin moved to make absolute the rule *nisi* admitting the applicant to sue *in forma pauperis* in an action against her husband for divorce by reason of his alleged adultery.

The order was granted.

THE PETITION OF WILHELM THIEL.

Mr. Close moved for the attachment *ad fundandam jurisdictionem* of this Court of certain lots of ground situate near the Rifle Range on Wynberg Flats, in an action about to be instituted by petitioner against Lodewick W. Daniels by edictal citation for the recovery of the amount of a mortgage bond.

Order granted.

SCHEEPERS V. SCHEEPERS. } 1895.
July 12th.

Divorce—Pauper suit.

The Court refused to allow a petitioner to sue his wife in forma pauperis in an action for divorce, where the respondent was alleged to have deserted the petitioner forty-five years previous to the date of the application.

This was the petition of Jan Scheepers, of Pearson.

The petitioner and his wife were married in community at Somerset East on 16th July, 1849.

Subsequently in October, 1850, the petitioner's wife deserted him, and on divers occasions since that date the petitioner alleged that she had committed adultery with one Jacob Kulaan, with whom she was at present living as his wife.

The petitioner asked for leave to sue his wife *in forma pauperis* for divorce.

Mr. Close moved.

The Court made no order.

The Chief Justice said: The respondent left the applicant, her husband, in 1850, and now after forty-five years he wished to sue *in forma pauperis*. It would be an abuse of the process of the Court to grant the order, which must, therefore, be refused.

[Applicant's Attorney, P. M. Brink.]

IN THE MATTER OF A BOND TO JOHANNA GIE.

Mr. Graham applied for authority to the Registrar of Deeds to cancel certain mortgage bond passed by the German Evangelical Lutheran Church congregation in favour of Catharina Gie, wrongly described as Johanna Gie, since deceased, the amount of the bond having been paid by the said congregation.

Order granted.

MURPHY V. MURPHY } 1895.
 } July 12th.

Divorce—Pauper suit.

Unless there are some very special circumstances the Court will not in future refer petitions for leave to sue in forma pauperis in actions for divorce to counsel.

This was the petition of Patrick Joseph Murphy, of Ceres.

The petitioner and his wife were married on the 5th May, 1891.

On the 12th January, 1894, petitioner's wife deserted him, and she is at present living at Tokai in a house rented by one Harry Lester and refuses to return to the petitioner.

The prayer was that the petitioner might be allowed to sue his wife *in forma pauperis* for restitution of conjugal rights, failing which for divorce.

Mr. Close moved.

The Court made no order.

The Chief Justice said: The Court, some time ago, had reason to consider pauper cases brought for the purpose of procuring a divorce, and we stated that we should consider the advisability of framing rules for such cases. The difficulty is that the Court could not frame rules for one class of cases without making them general; while as far as the general rules are concerned, they are about as fair as they could be. Unfortunately, however, they are applied to divorce cases with great frequency. People get married in the belief that after marriage they can, at the expense of the country, have the bonds dissolved. I do not think that the Court can establish that principle, and, unless under special circumstances, the Court will refuse to entertain in future any cases of this kind, or to refer them to counsel. Here is a case of a husband who wants to compel his wife to live with him, apparently with the object of getting a divorce from her. If it is an important matter to him, I am sure he can get some friends to help him. The Court will not grant the application, nor refer it to counsel.

[Petitioner's Attorney, Gus. Trollip.]

IN THE INSOLVENT ESTATES OF WILLIAM H. T. PEDLAR AND ISAAC J. J. VAN VUUREN.

Mr. Giddy moved for orders requiring the trustees of the said insolvent estates to file with the Master of the Supreme Court certain receipts for the dividends applicable to the accounts and plans of distribution therein, and that they pay the costs *de bonis propriis*.

Order granted.

IN THE INSOLVENT ESTATES OF CHARLES TURTON AND SAMUEL NICOLSON.

Mr. Giddy applied for orders for the personal attachment of the trustees of the said insolvent estates at the instance of the Master of the Supreme Court for contempt of Court, in failing to file accounts and plans of distribution therein as directed.

The order was granted with costs *de bonis propriis*.

IN THE INSOLVENT ESTATE OF PRINGLE.

Mr. Giddy applied for a similar order for the personal attachment of the trustee, who had filed an account but failed to pay the costs, and therefore had not legally completed the filing of account.

The order was granted.

Ex parte OOSTHUIZEN. } 1895.
 } July 12th.

Transfer deeds—Registration—Error.

Where transfer deeds had been erroneously registered in the Deeds Office, Cape Town, instead of in the Deeds Office, King William's Town, the Court authorised the cancellation of the originals and the issue of certified copies to be registered in the King William's Town Office as having been passed on the dates mentioned in the deeds.

This was the petition of J. C. Oosthuizen, of Hatfield, in the division of Cathcart, which is within the jurisdiction of the Registrar of Deeds, King William's Town.

The land was originally granted to one Seeber on 3rd October, 1879.

He transferred the land to one Froneman by deed dated 9th November, 1881. Froneman transferred the farm to one Perring by deed dated 26th June, 1882, and Perring transferred the land to the petitioner by deed of transfer dated 23rd October, 1882.

All these deeds of transfer were registered in the Deeds Office, Cape Town, whereas they should have been registered in the Deeds Office, King William's Town.

The petitioner prayed:

(a) That authority might be given to the Registrar of Deeds, Cape Town, to transmit to the Registrar of Deeds, King William's Town, certified copies of the deeds and to cancel the originals.

(b) That the Registrar of Deeds in King William's Town be ordered to accept such copies and to register them in his office as if passed on the dates mentioned, and to issue to the petitioner a certified copy of the deed of transfer passed in his favour as above stated, with a certificate showing the reason for the issue of such certified copy.

Mr. Buchanan moved.

The Court granted the order as prayed.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinné.]

MIDLAND AGENCY AND TRUST CO. { 1895.
V. BURGER. { July 12th.
Ex parte BURGER. { August 5th.

Commissioner of the Supreme Court—Affidavits—Practice.

Affidavits made outside the Colony should be sworn to before a Commissioner of the Supreme Court.

If affidavits are sworn to before a Vrede-rechter (Justice of the Peace) in the neighbouring Republics his appointment should be authenticated.

This was the petition of Andries Bartholomeus Burger.

The petitioner was the registered owner by deed of transfer dated 17th January, 1865, of certain piece of ground marked No. 11 in block "G," situate in the village of Aberdeen, measuring 328 square rods and 18 square feet.

On the 6th May, 1865, the property was mortgaged for £75 to the M. A. and Trust Co., and on the 12th June, 1893, the company obtained judgment against Burger and the abovementioned property was sold in execution by the Sheriff.

The amount realised by the sale was £252. After deducting the amount due to the company a balance of £117 13s. 2d. remained, but this balance is now in the hands of the Sheriff, who refuses to pay it to anyone without an order of Court.

On 6th August, 1868, the petitioner sold the property to S. P. Naude and B. A. Naude, but

no transfer was passed to them, and in or about 1886, B. A. Naude sold his share in the property to S. P. Naude, who in or about 1887 surrendered his estate and whose trustee sold the insolvent's right in this property to Thomas Andries Smook, the latter, on the 28th July, 1891, selling all his right in the property to S. P. Naude.

S. P. Naude has now claimed the balance in the hands of the Sheriff from the petitioner, who alleged that he was desirous of paying him.

The prayer was that the Court might be pleased to grant an order authorising payment of the amount now in the hands of the Sheriff to C. J. Burgman in his capacity as secretary of the M. A. and T. Co., to be by him paid over to S. P. Naude.

Mr. Searle, Q.C., moved.

The Court granted a rule *nisi* calling upon all persons concerned to show cause on 1st August why the relief asked for should not be granted. The rule to be served upon T. A. Smook and upon the trustee of the insolvent estate of S. P. Naude, and to be published once in the "Graaff-Reinet Advertiser."

Afterwards, on 5th August, the rule was made absolute.

The affidavit of service of the rule on Smook was sworn to by Mr. Attorney Mortimer, of Klerksdorp, S.A.R., before the local "Vrede-rechter" of whose appointment there was no authentication before the Court.

The Chief Justice, referring to this omission, said: If affidavits are made before a "Vrede-rechter" they should be accompanied by a certificate of authentication.

The expense and difficulty of obtaining such a certificate may be obviated by affidavits made outside the Colony being sworn to before a Commissioner of the Supreme Court.

[Attorneys, Messrs. Van Zyl & Buissinné.]

Re COLONIAL MARINE ASSURANCE { 1895.
AND TRUST COMPANY, LIMITED. { July 12th.

Company—Deed of Settlement—Alterations.

The Court ratified certain alterations approved of by the shareholders in their deed of settlement and having for their object the enlargement of the company's operations.

This was the petition of the chairman of the above company, which was formed and registered under the Act of 1861, in or about 1874, and has carried on business in terms of its deed of settlement from that time to the present,

The company has, in terms of the Companies Act of 1892, registered itself as a limited company under that Act.

By section 19 of the Act of 1892, the provisions contained in the company's deed of settlement are for the purposes of that Act deemed to be conditions and regulations of the company in the same manner and with the same incidents as if they were contained in a registered memorandum of association and articles of association, and the terms of the Act (1892) now apply to the company subject to the provisions in the said section (19).

The objects for which the company was established are set forth in its deed of settlement, and are as follows:

1. The assurance of ships or vessels and goods, merchandise, and effects or other property from risk at sea, or of property in being carried to or from such ships or vessels.

2. The assurance of coin, diamonds, precious stones and gold from risk or loss whilst being conveyed in wagons, railway trucks, by postal communication, or other means of conveyance through any part of South Africa to Europe.

3. The administration and management of such estates and other property as the said company shall be duly appointed to administer or manage as executors, tutors, guardians, curators, or administrators, trustees, assignees or agents, either under or by virtue of a decree or order of any competent Court, or by the direction of the Master for the time being of the Supreme Court of this colony, in his official capacity, or by the last will or testament or any valid deed or act of any person or persons whomsoever, or by virtue of any marriage settlement, power of attorney, or otherwise.

By section 22 of the deed of settlement the directors of the company may at any time call a special general meeting of the shareholders for the purpose of submitting to their consideration any question or matter concerning the interests of the company.

The 66th section of the deed of settlement sets forth the manner in which its terms may be repealed, amended, or modified, and any additional provisions be made.

Notice was published in the "Gazette" and "Cape Argus" on 2nd April, 1895, and in the "Cape Times" of the 3rd April, 1895, calling a meeting of shareholders to be held on 20th May last.

On 12th April, a circular was sent to each of the shareholders of the company at their addresses. This circular referred to a previous circular of 24th January, 1894, in which an amalgamation of the Colonial Fire Assurance Company (Limited) with the applicant company was

advocated by the directors of both companies, and pointing out the changes proposed to be effected, viz.: the increase of the capital from £100,000 to £250,000, the alteration in the objects of the company to be added to a new deed of association.

With this circular was sent a draft of the new deed of association.

On the 20th May, the meeting of shareholders was held at which the following resolution was carried . . . "That a deed of association be drawn up and executed in accordance with the terms of the new deed of association as amended, which deed shall be of full force, virtue and effect, and shall supersede upon execution the deed of settlement now in force."

This resolution was carried without dissent by the shareholders at the meeting.

The amendments made in the draft deed of association submitted to shareholders in no way affected the objects of the company.

A further meeting of shareholders was called on 24th June, and at this meeting it was unanimously resolved: "That the resolutions moved and carried at the special general meeting of shareholders held on the 20th May, 1895, and then read, be duly ratified and confirmed in terms of section 110 of the Companies Act, 1892."

The petitioners alleged that the alterations in the objects of the company were required to enable the company:

(a) To carry on its business more economically and efficiently.

(b) To attain its main purpose.

(c) To enlarge the local area of its operations and

(d) To carry on the other business set forth in the draft deed of association aforesaid which are naturally connected with the business of the company as set forth in its original deed of settlement and which may be advantageously combined with such original business.

That there are no holders of debenture stock of the company and all shareholders have been notified of the proposed alterations in manner aforesaid, and that there are no creditors of the company having unsatisfied claims.

The prayer was for an order confirming in so far as required by law the alterations made in the company's deed of settlement by the adoption by shareholders of the amended draft deed of association.

Mr. Searle, Q.C., moved.

The Court granted the order as prayed.

[Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

Re THE ALBERT DISTRICT GOLD COMPANY.

Mr. Searle, Q.C., presented the fourth and final report of the official liquidator.

SUPREME COURT.

[Before Sir HENRY DE VILLIERS, K.C.M.G.
(Chief Justice), and Mr. Justice UPINGTON,
K.C.M.G.]

REGINA V. TALLY SEPTEMBER.

This case came on review from the Resident Magistrate of Clanwilliam.

The accused, a lad aged twelve, was charged under Act 21 of 1869 with malicious mischief, in that he did on or about the 24th June, 1895, and at or near Boontjes River, wrongfully, unlawfully, and maliciously fasten a piece of wire on to the telegraph wire, and from the telegraph wire to a boulder on the ground, thus running the current to earth.

There was no legal evidence whatever that the offence had been committed by the accused. Such evidence as there was went to show that one Opgraap was the offender.

The accused was found guilty, and sentenced to receive ten cuts with a cane or rod.

The Chief Justice, after stating the facts, said: There was not a tittle of evidence that the offence charged was committed by the accused. Whatever evidence there was pointed to the offence having been committed by Opgraap. Under these circumstances the conviction will of course be quashed. I must express my surprise that any magistrate could have convicted anyone on such evidence, especially a child of twelve years of age.

VAN DER WALT V. KRUGER, PELSER & CO. { 1895.
AND CO. { July 23rd.

Insolvency—Liquidation—Liabilities.

Where the liabilities of a partnership were not in respect of the general body of creditors but were represented by losses on the partners' capital and an agreement had been come to amongst the members of the partnership to liquidate their business, and it was anticipated that there would be a substantial balance after all creditors had been paid in full,

The Court discharged a provisional order of sequestration obtained on the petition of a creditor, the wife of one of the partners.

This was an application for the final adjudication of the defendants' estate.

The petitioning creditor was the wife of one of the partners of Kruger, Pelsner & Co. She

alleged in her petition that she was married out of community to her husband, that he lent the sum of £500 her property to the firm upon its passing a promissory note for that amount in her favour, which was dishonoured on the due date.

That in May last the partners of the firm were called together, and a balance-sheet of the affairs of the firm, prepared by the managing partner, was put before them.

That from the balance-sheet it appeared that the liabilities exceeded the assets by the sum of £538 1s. 10½d.

That her husband was induced by the managing partner to renew the promissory note for £500, as also to accept a bill for the other moneys due to the petitioner. The exact amount due by the firm to the petitioner being £520 5s. 1d, and £44 on the two promissory notes.

She further alleged that if allowance were made for bad and doubtful debts the deficiency on the balance-sheet would be £2,500.

That some of the partners had decided to voluntarily liquidate the firm's business and others were desirous to surrender the firm's estate as insolvent. That no assignment had been offered or accepted by the creditors of the firm nor had they been consulted with regard to the liquidation.

That though the liquidation had been decided upon the firm still carried on business and contracted further liabilities.

That some of the partners of the firm had lately mortgaged and otherwise done away with their private estates.

That the term of the partnership expired on 1st March last, and that on that day notice of its dissolution should have been given creditors, but no such notice was ever given.

The prayer was that the estate might be placed under sequestration for the benefit of creditors.

Upon this petition the provisional order was granted by the Chief Justice on 27th June, 1895.

It appeared from the affidavits filed in opposition to the present application that at a meeting of all the partners held in May last they all agreed to liquidate the business, and that the firm's liabilities were not in respect of the general body of creditors, but were represented as losses on the partner's capital account.

The managing partner, who was also one of the liquidators appointed at the meeting above referred to, alleged in his affidavit that he anticipated that there would be a balance of £2,500 after all the creditors had been paid.

Mr. Juta, Q.C., for plaintiff.

Mr. Rose-Innes, Q.C., for the defendants.

The Court discharged the provisional order with costs.

[Plaintiff's Attorney, G. Montgomery Walker; Defendants' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

CLOETE'S TRUSTEE V. GREEN. { 1895.
July 23rd.

Notice of appeal—Resident Magistrate—
Withdrawal.

When an appeal has been noted from a Magistrate's judgment, which has been carried into execution, and security found by the successful suitor under Act 20 of 1856, Schedule B, Rule 34, and the appeal is not prosecuted, notice of withdrawal should be given to the Magistrate.

This was an application on notice to the respondent that she would be required to show cause (1) why the notice of appeal given by her on 12th November, 1894, to the clerk of the Magistrate who decided the case of Cloete's Trustee v. Green, and also the notice of appeal given by her on 21st November, 1894, to the plaintiff in the Court below and his attorney, should not be discharged, and the appellant barred from prosecuting such appeal by reason of her failure to prosecute and bring to final determination the said appeal within a reasonable time.

2. To show cause why she should not be ordered to pay the costs of this application and the costs occasioned by her notice of appeal dated 21st November, 1894.

The case was heard before the Resident Magistrate of Aliwal North on 8th November, 1894, and resulted in a judgment for plaintiff (the present applicant) for £20 and costs.

On the 12th November, 1894, the defendant gave notice of appeal. The amount of the judgment and costs was paid by the defendant on the plaintiff giving a security bond in terms of rule 34, Schedule B, Act 20 of 1856. The bond is still in force. The appeal was not prosecuted, and although a lengthy correspondence passed between the attorneys of both sides subsequent to the noting of the appeal, none of the letters contained an unconditional withdrawal of the notice of appeal.

Mr. Searle, Q.C., for the applicant.

Mr. Rose-Innes, Q.C., for the respondent.

The Chief Justice, in giving judgment, said: The applicant is entitled to the costs of the present application. There has been no unconditional withdrawal of the appeal by the ap-

pellant. In the letters which had been written on behalf of the appellant to the respondent's agent there was always a reservation, and the appellant could at any time have proceeded with her appeal, as there was nothing to debar her. In my opinion there was no unconditional withdrawal of the appeal unless notice were given to the Magistrate to whom the notice of appeal had been given. In the present case no such notice has been given, the Magistrate still holds the security, and the plaintiff could not be discharged from that security until the Magistrate had received notice of withdrawal. In my opinion, therefore, the applicant is entitled to an order barring the appellant from prosecuting her appeal, and to a further order that she pay the costs of the present application. No order will be made as to the costs incurred by the applicant's attorney in consequence of the notice of appeal.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

ST. LEGER V. TOWN COUNCIL OF { 1895.
CAPE TOWN. { July 24th.

Servitude against obstruction of light—
Construction—Servient and dominant
tenement.

A servitude against the obstruction of light by the owner of land was constituted in the following terms: "The proprietors of this lot shall by no means whatever obstruct the windows of the store of lot No. 3 looking into the passage belonging to lot No. 1 nor prevent free access of light into the same."

Held, that the servitude applied to windows of the store in existence at the time when the agreement for a servitude was made and that the owner of the servient tenement should not be interdicted from obstructing the light entering the store by means of additional window space constructed by the owner of the dominant tenement.

This was an application, on notice, for an interdict to restrain the Town Council from obstructing, or in any way interfering with, the free access of light into the windows of the applicant's property in Burg-street, overlooking the passage between it and the Fire Brigade Station, and for an order to compel the Town Council to remove all erections and structures placed by them in or over the said passage.

It appeared from the applicant's affidavit that he is the owner of a building situated in Burg-street, and that the Town Council are the owners of the adjoining property, which is occupied as a Fire Brigade Station.

The two properties are portion of a piece of ground, which in the year 1853 was divided into five lots, of which lots 4 and 5 form the premises in St. George's-street, owned by the applicant, and occupied as the offices of the "Cape Times." Lot 3 is also the property of the applicant, and lots 1 and 2 are the Fire Brigade Station. Lot No. 1 was sold subject to certain servitudes in favour of lot 3, which are embodied in the deed of transfer, and are as follows: "That the proprietors of this lot shall by no means what-ever obstruct the windows of the store on lot 3, looking out into the passage belonging to lot No. 1, nor prevent free access of light into same. That the proprietors of lots 2 and 3 and their workmen, on giving due notice to the proprietors of lot No. 1, shall be allowed free access into the passage belonging to this lot for the purpose of repairing the walls of their respective buildings whenever repairs become necessary."

"That the water from the roofs of the stores on lots 2 and 3 shall be led off in the said passage of No 1."

When lot 3 was purchased by the applicant in 1892 there were nine windows overlooking the passage on lot No. 1, six on the ground floor, and three on the upper floor. The light of three of these windows was then partially obstructed by a portion of the passage having been covered in, but as this did not affect the applicant materially at that time he did nothing beyond verbally drawing the attention of the Superintendent of the Fire Brigade to the fact.

Recently six of the old window frames were removed and new frames double the size of the old frames were substituted. The Town Council thereupon demanded that the windows should be blocked, and eventually they entirely blocked four large windows in the upper part of the St. George's-street premises, which overlooked their yard. The Council then gave notice that they intended to block one-half of each of the windows which had been doubled, and on the 12th instant they commenced operations by blocking half of one of the windows.

On a recent inspection of the passage the applicant found that one of the three windows which had not been altered, had been also blocked by having a beam placed across the passage and against the shutter, which opens outwards.

The applicant alleged he had offered to meet the Town Council in every reasonable way by fastening and frosting the lower sashes of

the windows overlooking the passage, and by placing iron bars in each window, in order to prevent the possibility of any person passing through the windows, but the Council declined to agree to anything but their own terms, which amounts to nothing less than a waiver of the servitude.

The position taken up by the Council was: (1) That doubling the size of the windows was prejudicial to the value of the Council's property, and had the effect of causing windows to be directly opposite to the single men's quarters at the Fire Brigade Station, which, seeing that the applicant had a number of girls and women in his employment, was most undesirable; (2) that the applicant was only entitled to light admitted through windows of the same size as those which existed when the servitude was created.

The Council, in one of their letters to the applicant, offered (without prejudice to their legal rights) to allow the windows to remain provided a nominal rental of 1s. per annum were paid in recognition of the rights of the Council, and provided that the windows were secured with iron bars, that the lower half of the windows were fastened so that they could not be opened upwards, and that the windows were glazed with ground glass. This arrangement, if carried into effect, to be clearly defined on the applicant's deeds of transfer at his expense.

The offer with regard to the rental of 1s. per annum and the registration on the applicant's title deeds having been refused, the matter now came before the Court for final settlement.

The case resolved itself into the proper construction to be placed on the words *the windows* on the titles of the servient tenement.

Mr. Searle, Q.C., for the applicant: It is clear from the terms of the servitude that the Town Council cannot block the applicant's windows. The windows referred to must not be confined to the then existing windows but to all future windows which might be constructed. See *Voet*; (8, 2, 11) *Grotius* (2, 34, 20, 21, 22).

The servitude must be construed reasonably.

It is most important in a printing business that there should be as many windows as possible.

The objection raised by the Town Council is purely sentimental.

Mr. Rose-Innes, Q.C., for the respondents. By English law as by our law every man may at his pleasure, apart from servitude, make any aperture or window in a dwelling upon his own property, but his neighbour may at his pleasure erect any structure upon the neighbouring ground so as to block that window. So far the law of the two countries is the same. See *Gale*, p. 300-302.

But then comes this difference. In England if a window has existed for twenty years it becomes an ancient light by lapse of time and cannot therefore be obstructed. By our law it may always be obstructed unless the owner has acquired a negative servitude over the neighbouring property, and that can only be acquired by thirty years' enjoyment after an adverse act; *e.g.*, if he prevented an obstruction and has enjoyed the light for thirty years. See *Schorer* (Note 218); *Voet* (8, 2, 6).

Here we have to deal with a servitude in favour of applicant's property and against respondents' property. Lot No. 1 is not to obstruct *the windows* of Lot No. 3, nor prevent the free access of light into same. That means the windows as they existed when the servitude was created. It could not refer to any number of new windows.

Servitudes should be construed in manner least onerous to the servient tenement.

The passage cited from *Voet* (8, 2, 11) does not apply, as the word *windows* in the servitude is not used in the general terms referred to by *Voet*.

As to the English law on the subject, see *Blanchard v. Bridges* (4 A. & E., 176); *Turner v. Spooner* (30 L.J., Eq., 801); *Chandler v. Thompson* (3 Camp., 80); *Martin and Another v. Goble* (1 Camp., 322).

As to the applicant allowing the obstruction in the passage for so long a period (13 years) see *Edmeades v. Mostert* (1 Juta, 334).

Mr. Searle, Q.C., in reply: It would be exceedingly difficult now to ascertain what the dimensions of the windows were when the servitude was created.

De Villiers, C.J.: Little assistance can be derived from the Dutch and English authorities which have been cited, because the decision of this case must depend upon the construction of the particular clause creating the servitude now in question. The terms of the clause are as follows: "That the proprietors of this lot shall by no means whatever obstruct the windows of the store of Lot, No. 1, nor prevent free access of light into the same." The question then is what is meant by the "windows." Mr. Searle boldly contends that the term is wide enough to embrace all windows which, at the time when the servitude was created, were in existence, and which thereafter might be placed in the wall. In support of the view that this wide interpretation should be given to the words a passage in *Voet* (8, 2, 11) has been quoted. That passage, however, goes no further than this, that where a servitude is created in general terms, that lights shall not be obstructed, it is the better opinion that it applies to every

window whether it was then in existence or was constructed afterwards. It is impossible in the present case to say that the servitude has been created in general terms. The terms are specific, for they relate to "the windows of the store looking out into the passage." If the words had been "any windows looking out into the passage" or if there had been a general prohibition of interference with the light of the store the passage would have been more nearly applicable. But the words actually used satisfy me that the parties to the agreement intended only that the light entering the then existing windows should not be obstructed. The applicant has doubled the size of his windows and the respondent Council have done no more than obstruct the light entering into the additional window space, with the result that the applicant obtains as much light now as he did before he made the alteration. The application must therefore be refused with costs.

Upington, J., concurred.

[Applicants' Attorneys J. & H. Reid & Nephew; Respondents' Attorneys Messrs. Fairbridge, Arderne & Lawton.]

THE PETITION OF LEON BAART.

Mr. Graham applied for leave to the applicant to sue by edictal citation in an action against his wife for divorce by reason of her alleged adultery, also for the custody of the minor child of their marriage, and the forfeiture by his wife of all benefits under the ante-nuptial contract.

The Court granted the order as prayed, returnable on the first day of November term. Personal service to be effected, failing which, a further application to be made for directions as to service.

THE PETITION OF JOHANNES S. F. POTGIETER.

Mr. Graham moved for the attachment *ad fundandam jurisdictionem* of this Court of certain one-eighth share of the farm Matjesgoedvlei, in the district of Oudtshoorn, in an action about to be instituted by petitioner, by edictal citation, for recovery of an amount due on a promissory note.

The Court granted the order as prayed, returnable on the 15th August.

SOMERVELL BROTHERS V. } 1895.
CUTHBERT AND CO. } July 25th.

Trade mark.

Application on motion for the removal from the register of the trade mark CKing, alleged

to be an infringement of the trade mark "K" in a diamond, refused, on the ground (1) that the application was made twelve months after registration, (2) that there was no proof that anyone had been deceived, and (3) that the applicant himself, when first informed of the mark being used by the respondent in the Transvaal found no fault with it.

Leave given to applicant to institute action for infringement of his trade mark.

This was an application on notice to the respondents that they would be called upon to show cause why the trade mark "CKing" should not be removed from the register of trade marks in this colony, on the ground that the same is an infringement of the applicants' trade mark "K" previously registered in this colony.

The applicants are the firm of Somervell Brothers, of Netherfield, Wendal, in the county of Westmoreland, and have for many years carried on business as manufacturers of boots and shoes, which are sold in large quantities in the British colonies, in the United Kingdom, and in foreign countries.

For the last thirty years the applicants have been in the habit of impressing the letter "K" within a diamond surrounded by a curvilinear line upon all boots and shoes of their make, and they are very widely known as "K" boots and shoes.

The applicants have been since 1886 the registered proprietors of the trade mark "K," as described above, for the sale of boots and shoes in class 38 in the Trade Marks Registry Office, Cape Town.

On the 3rd July, 1894, the applicants received an intimation from Messrs. Stuttaford & Co., of Cape Town, that an advertisement had appeared in a newspaper there attracting attention to boots known by the distinctive mark of "King" surrounded by a capital C, and manufactured by Messrs. Cuthbert & Co.

The applicants alleged that they had never previously been aware of the use of the mark in Cape Colony, and at once entered into communication with Messrs. Stuttaford & Co. with a view to preventing the respondents from registering the mark, which both Messrs. Stuttaford & Co. and they (the applicants) regarded as a colourable imitation of their "K" mark.

That before they received a reply to their inquiries from their agents, which reached them on 31st August last, respondents had completed the registration of their mark, viz., on 3rd August,

That if the applicants had had knowledge of the application to register, they would have opposed the registration.

That since the first intimation of the use of the objectionable mark, the applicants had been diligently pursuing their inquiries, and were now for the first time in a position to apply for cancellation of the registration.

The applicants further alleged that the mark registered by the respondents so nearly resembles the mark previously registered by them (the applicants) as to be calculated to deceive the public, and that their business in Cape Colony would be injured.

Mr. Thorne, senior partner of the firm of Thorne, Stuttaford & Co., filed an affidavit, in which he alleged that in his opinion the respondents' registered mark was an infringement of the applicants' mark.

The respondents, in their answering affidavit, denied that their mark was a colourable imitation of the applicants, or that it was intended to be so.

They alleged that it was in use in Cape Colony for many years before it was registered, and that it was first adopted in connection with miners' boots in Kimberley, which were known as "King Miners' boots."

They also directed the attention of the Court to a letter received by them from the applicants, dated 25th June, 1894, in which the following passages occur: "We note that you have succeeded in getting an apology from a firm who has been infringing your 'CKing' brand of boots. You may be interested in recent reports of two cases in which our 'K' was involved, and which were both decided in our favour. We have another case in the Courts at the present moment."

This letter was in answer to one from the respondents, in which the mark now complained of appeared.

Mr. Molteno appeared for the applicants.

Mr. Rose-Innes, Q.C., appeared for the respondents.

The application was refused.

De Villiers, C.J.: The question whether a particular trade mark is calculated to deceive is one of fact. Where such a trade mark is found, after registration, to constitute a palpable infringement of an existing trade mark the Court would not scruple, merely because the application was by motion, to order a rectification of the register. If, however, the question is a doubtful one it is more satisfactory to try it by action. In the present case I am not prepared to say that the trade mark objected to is clearly one which is calculated to deceive the public. It is an important circumstance that the

applicant himself was not struck by the alleged resemblance when, in the course of last year, he was informed by the respondent that the latter had obtained apologies from several persons for infringing his trade mark. That trade mark, which is the very one now in question, was fully described in the letter sent to the applicant, and yet in his reply he found no fault with the device and quite contentedly mentioned the fact that he had been successful in preventing infringements of his own mark. A second circumstance to be borne in mind is that although the respondent's mark has been registered for over twelve months not a single statement is produced to the effect that anyone had been misled into buying "CKing" boots or shoes in the belief that he was buying "K" boots or shoes. Surely if the mark were so deceptive as alleged some one of the public would have been prepared to prove that he had been deceived. A third consideration which weighs with me is the delay in applying for a rectification of the register. Part of the time has been accounted for, but if the deception were so glaring as the applicant now says it is, he would have been more prompt in restraining it. In refusing this application I wish it to be understood that the applicant will not be prevented from proceeding by action if he hopes by means of oral evidence to prove the infringement of his trade mark. The application must be refused but the question of costs will stand over.

Upington, J., concurred.

[Applicants' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondents' Attorney, G. Montgomery-Walker.]

GREEN AND FITZGERALD V. BRADFORD. { 1895.
{ July 25th.

Appeal—Time—Extension.

When an appeal from a Magistrate's judgment has not been prosecuted within the time allowed, good and sufficient cause for the delay must be shown on an application for an extension of time.

Where therefore there had been considerable delay in prosecuting an appeal, and but little hope of success, the Court refused to grant an extension.

This was an application on notice to the respondent that he would be called upon to show cause why the time allowed (and which has elapsed) for carrying the appeal from the judgment of the Circuit Court which sat at Aliwal

North on 22nd April, 1895, should not, if necessary, be extended by the Court, and the hearing of the appeal set down for some convenient day during the ensuing term.

The case Bradford v. Green & Fitzgerald was heard on 22nd April, and judgment was given in favour of the plaintiff for £10 damages and costs.

On the 3rd May the defendants gave notice of appeal to the plaintiff and to the Registrar of the Court, but no further steps were taken nor was application made to the Court during last term to extend the time within which appeals from Circuit Courts must be prosecuted under Act 5 of 1879.

Mr. Watermeyer for applicants.

Mr. Benjamin for respondents.

The application was refused with costs.

The Chief Justice said: There is no doubt that the applicants have not duly prosecuted their appeal; but that would not prevent them from applying to the Court for an extension of time within which to prosecute their appeal. The application must, however, be made on good and sufficient cause shown, but no good and sufficient cause has been shown for the delay. In fact there has been unnecessary delay on the part of the applicants. There is no proof that they have done everything in their power to expedite matters, for beyond giving notice of appeal they have done nothing whatever. From my knowledge of the case also—which I obtained on previous applications to the Court—I am quite satisfied that it is a case in which the Court ought not to render any assistance to the applicants. The application must be refused with costs.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondents' Attorneys, Messrs. Van Zyl & Buissinné.]

SIGCAU V. THE QUEEN. { 1895.
{ July 30th.

Liberty of the subject—*Habeas Corpus*—Trial and sentence by Proclamation—Pondoland Annexation Act, 1894.

The Act for the annexation of Pondoland enacts that the said Territory shall be subject to such laws as have already been proclaimed, and such as, after annexation, the Governor shall from time to time by Proclamation declare to be in force in such Territory.

Among the laws so introduced was the Native Territories Penal Code,

Thereafter the Governor issued a Proclamation declaring that the Chief Sigcau "had by his acts, in disregard and defiance of the law, rendered himself liable to arrest," and authorising the Chief Magistrate to arrest and detain him in such safe place as may be by the Governor from time to time determined.

Held, on an application by Sigcau for his release from imprisonment, that the Act did not authorise the issue of a Proclamation for the arrest, condemnation and imprisonment of any individual, without the intervention of any judicial tribunal, and that the applicant was entitled to be released.

This was the petition of Sigcau, late Paramount Chief of the Pondo.

The petition set forth that the petitioner was at present confined in the lock-up at Kokstad under an order of the Chief Magistrate of Griqualand East.

That on the 11th June, 1895, His Excellency the Governor issued a Proclamation which recited amongst other things that the petitioner refused to permit a duly authorised officer of the Government to discharge his lawful duty, and that it was expedient to make provision for the arrest of the petitioner, and for his detention either within or beyond the boundaries of Pondoland, and declared that the petitioner had by his acts in disregard and defiance of the law rendered himself liable to arrest. The Proclamation then proceeded to command the Chief Magistrate of Griqualand East to cause the petitioner to be arrested if he failed to surrender.

That when the petitioner heard of the issue of the Proclamation and before its execution he forthwith decided to proceed to Kokstad, where he arrived on 18th June, 1895, and immediately reported himself to the Chief Magistrate.

That he was forthwith confined in the lock-up at Kokstad and placed under a strong guard, where up to the present time, a period of more than a month, he had been held a prisoner without having been brought to trial before a competent Court, but having unwillingly and under protest been compelled to submit himself to an inquiry which he was informed by the Chief Magistrate, through his legal advisers at Kokstad, Messrs. Jones and Walker, was not a judicial inquiry.

That not only had he (petitioner) not been brought to trial, but he had not been charged

before any Resident Magistrate nor had any criminal proceedings of any kind been taken against him.

That on 1st July, 1895, the Commission of Inquiry held its first meeting, and the sittings were continued from time to time until eventually on 12th July, 1895, the members of the Commission signed their report.

That the petitioner was not aware of any legal warrant having been issued for his imprisonment, but if such existed, he was desirous of being brought before the proper tribunal and of being tried according to law, and though he had notified this desire nothing more than the inquiry hereinbefore referred to had taken place.

That the petitioner had been exonerated from blame in connection with the alleged ill-treatment of registering officers in Eastern Pondoland present there for the purposes of hut tax, the Commission reporting that the petitioner could not be held to have obstructed the Registering Officer in his work of registration, nor for the armed gathering of his followers at the Great Place in connection with the registration, upon which charges the petitioner believed the Proclamation was specially issued.

That the Proclamation was issued long after the happening of the events charged.

That the petitioner was desirous of ascertaining upon whose authority, and under what warrant, and upon what charge he was now detained in prison at Kokstad, that if he had been guilty of any offence he wished to be tried before a properly constituted tribunal according to law.

That he was a British subject, and that Eastern Pondoland was now a portion of this colony, its magistrates being appointed by the Colonial Government.

The petitioner prayed that their lordships might be pleased to inquire by what authority he was detained in custody, and that in default of lawful authority their lordships would order his immediate liberation and discharge.

Or otherwise that their lordships would call upon the Magistrate of Kokstad, under whose custody the petitioner was, to produce him before their lordships, and to show cause why he should not be discharged.

The full text of the Proclamation was as follows:

THE CAPE OF GOOD HOPE GOVERNMENT GAZETTE EXTRAORDINARY.

[Published by Authority.]

TUESDAY, 11TH JUNE, 1895.

PROCLAMATION

By his Excellency the Right Honourable Sir HERCULES GEORGE ROBERT ROBINSON, Baronet,

A Member of Her Majesty's Most Honourable Privy Council, Knight Grand Cross of the Most Distinguished Order of Saint Michael and Saint George, Governor and Commander-in-Chief of Her Majesty's Colony of the Cape of Good Hope in South Africa, and of the Territories and Dependencies thereof, and Her Majesty's High Commissioner, &c., &c., &c.

Whereas after previous acts of disobedience to the lawful orders of the Colonial Government, it has recently been reported to me that Sigcau, the Chief of the tribes residing in the territories of Eastern Pondoland, has now refused to permit a duly authorised officer of the Government to discharge his lawful duty:

And whereas it appears to me that the presence of the said Sigcau in Eastern Pondoland is dangerous to public safety and good order in that country, and is likely to lead to the disturbance of the peace:

And whereas it appears to me to be expedient to make provision for the arrest of the said Sigcau, and for his detention in some suitable place either within or beyond the boundaries of Pondoland, but within the territories of the Transkei, Tembuland and Griqualand East:

Now, therefore, under and by virtue of the powers invested in me by law, more especially in the Acts annexing the territories of the Transkei, Tembuland, Griqualand East and Pondoland, I, the Governor aforesaid, do proclaim, declare and make known that the said Sigcau has by his acts in disregard and defiance of the law rendered himself liable to arrest; And I do hereby authorise and command the Chief Magistrate of Griqualand East to cause the said Sigcau on failure to surrender himself to be forthwith arrested; and do ratify and confirm all acts done or authorised by the said Chief Magistrate, or done with his approval by any officer of the law proper for the execution of criminal warrants, any member of the force of Cape Mounted Riflemen, any Constable, Police Officer or Gaoler in and about the arrest

of the said Sigcau, or with a view to securing his person, or in encountering, opposing or suppressing any resistance by or in behalf of the said Sigcau, and his subsequent arrest and custody under this Proclamation. and I do authorise and empower the said Chief Magistrate or any other person acting in accordance with my instructions, to detain the said Sigcau in such place in the aforesaid territories as may be by me from time to time determined, during such time and under such conditions as to safe custody as may appear to me to be necessary and expedient for the preservation of public order and safety: Provided that it shall be lawful, after such inquiry as may be instituted by my direction, and in case it may be possible so to do without jeopardy to the interest of public peace and order, to release the said Sigcau from close custody in detention, and to appoint a place within the said territories for the residence of the said Sigcau with the pecuniary allowances to which he is entitled, but under such terms and conditions as may be determined by further Proclamation.

GOD SAVE THE QUEEN!

Given under my hand and the Public Seal of the Colony of the Cape of Good Hope, this 11th day of June, 1895.

HERCULES ROBINSON,
Governor.

By Command of His Excellency the Governor in Council.

C. J. RHODES.

Mr. Juta, Q.C. (with him Mr. Benjamin), for the petitioner: The Proclamation was *ultra vires*, but even if its terms had been embodied in Act 5 of 1894 it would not have been a legal enactment unless the Queen had expressly signified her assent thereto.

It was attempted to justify the Proclamation as a law, and that, being a law, it was impossible to go behind it. By the Annexation Act Parliament delegated certain powers to the Governor, but no greater powers than Parliament itself could have. Parliament could not pass such a law as the Proclamation without the consent of the Queen; and under the Royal instructions to the Governor, it was provided that he could assent to no law that was repugnant to the law of England. It has been repugnant to the law of England since the date of the Great Charter to detain a man in custody without a proper trial.

It is submitted that the petitioner is entitled to be released.

Mr. Schreiner, Q.C., A.G. (with him Mr. Giddy) for the Crown: The real point is whether any case has been made against the

Proclamation under which Sigcau is now detained. If the Proclamation is valid then the present application must fail.

The Proclamation was issued under section 2 of Act 5 of 1894. That the Legislature intended to confer on the Governor the powers which he exercised in the Proclamation is clear from the proviso to section 2.

It would be a serious matter for the peace of the country, if Sigcau were to succeed on this ill-advised application.

Mr. Juta replied.

The Court granted the application.

De Villiers, C.J.: The petitioner, who was the late Paramount Chief of Pondoland, complains that he is illegally kept in custody by the Resident Magistrate of Kokstad, and the respondents justify the detention on the ground that it has been authorised by the Proclamation of His Excellency the Governor, published in due form on the 11th June, 1895. The Proclamation purported to be issued by virtue of the Acts annexing the territories of the Transkei, Tembuland, Griqualand East and Pondoland. The Pondoland Annexation Act was passed in 1894, after the petitioner had duly ceded his territory to Her Majesty the Queen. The 2nd section enacts that the said territory shall be "subject to such laws, statutes and ordinances as have already been proclaimed by the High Commissioner, and such as, after annexation to the Colony, the Governor shall from time to time by Proclamation declare to be in force in such territory." Among the laws in force at the date of the Proclamation was Act 24 of 1886 which provides a complete penal code for the Native Territories. The Act minutely details all offences against public order, public tranquillity, and the administration of justice and provides for the adequate punishment of such offences. Under the 112th section any attempt to obstruct the course of justice or the administration of the law is punishable with death or with imprisonment for life. The 20th Chapter provides a complete system of judicial procedure for the arrest, trial, and condemnation of offenders and confers criminal jurisdiction on certain specified local Courts. Under the 258th section power is reserved to the Attorney-General to remove any case for trial to the Supreme Court in case it should appear to him that substantial justice might thus be better attained. The 268th section provides that "in every case in which judgment has been given and sentence passed under the provisions of this Code it shall be lawful for the convicted person to appeal therefrom to the Supreme Court." Let any offences, which are such by the general law of the Colony, but are not provided for by

the Code, should go unpunished, the 269th section provides that such offences shall be punishable as if they had been committed in the Colony proper. Neither in the Code nor by the general law of the Colony is any distinction drawn between British subjects and aliens so far as the right to personal liberty is concerned, but the petitioner's right to the assistance of the Court is certainly not diminished by the fact that he is and claims to be a British subject. After the annexation of his territory he elected to remain in the country and, according to recent decisions of this Court, he must be presumed to have adopted allegiance to the British Crown. The right of every inhabitant to protection against any illegal infraction of personal liberty has been clearly established by the case of *Kok v. The Queen* (Buch. 1879, p. 45) and, indeed, has not been disputed on behalf of the respondents. The Proclamation under which the petitioner's imprisonment is sought to be justified in effect orders his arrest without a judicial warrant, and condemns and sentences him without a trial. It recites that after previous acts of disobedience to the lawful orders of the Colonial Government, it has recently been reported to the Governor that the petitioner "has now refused to permit a duly authorised officer of the Government to discharge his lawful duty," that his presence in East Pondoland is dangerous to public safety and good order in that country, and that it is expedient to make provision for his arrest and for his detention in some suitable place. It then proceeds to proclaim and declare that the petitioner has by his acts in disregard and defiance of the law rendered himself liable to arrest, and to authorise the Chief Magistrate of Griqualand East to arrest and detain the petitioner in such safe place as may be by the Governor from time to time determined. It is impossible to ascertain from the Proclamation what specific law the petitioner has "disregarded and defied." The nearest approach to a specific charge is the recital that 'he has now refused to permit a duly authorised officer to discharge his lawful duty,' but who the officer was and what his duties were is not stated. The Proclamation does not allege that the petitioner has committed some act which, although not criminal under the general law of the colony, or under the Penal Code, ought to be punished by means of a retrospective statute applicable to his special case. If, on the other hand, the petitioner has been guilty of a defined criminal offence it has not even been suggested on behalf of the respondents that any necessity existed for superseding the judicial tribunals and trying the man by Proclamation.

The local Courts were open for the trial of all offences committed in the territory and if, for some unknown reason, it was advisable that the petitioner should be tried elsewhere, it would have been competent for the Attorney-General to indict him in this Court. But the respondents take their stand on the Proclamation, which, they say, had the force of law in Pondoland, and cannot be questioned by this or any other Court of law. If they are right, this Court would undoubtedly have no power to interfere, and the petitioner must be left to undergo such restraints of his personal liberty as the Governor in his discretion may from time to time direct. The important question therefore arises whether a Proclamation issued by the Governor for such purposes, and under such circumstances as I have detailed, has the force of law. Whatever validity the Proclamation might have it derives from a Colonial Act of Parliament, but Mr. Juta, on behalf of the petitioner, contends that even if the terms of the Proclamation had been embodied in an Act of Parliament it would not have been a legal enactment unless Her Majesty had expressly signified her assent thereto. The 82nd section of the Constitution Ordinance enacts that whenever any Bill which has been passed by the Legislative Council and House of Assembly shall be presented for Her Majesty's assent to the Governor he shall declare, subject to such instructions as may from time to time be given in that behalf by Her Majesty, that he assents to such Bill in Her Majesty's name. One of the instructions given to the Governor is that Bills which are repugnant to the law of England must be reserved for the signification of Her Majesty's pleasure thereon. The 84th section of the Ordinance enacts that no Bill reserved for the signification of Her Majesty's pleasure thereon shall have any force or authority until the Governor shall signify that such Bill has been laid before Her Majesty and that Her Majesty has been pleased to assent to the same. There is considerable force in the contention that any Bill which ought, in terms of the 82nd section, to have been reserved for the Queen's assent, does not become law merely because the Governor has assented thereto and that until the Queen's assent has been specially signified in the manner provided for by the 84th section such a Bill has no force or authority. A Governor, as has been declared by the Judicial Committee of the Privy Council (*Cameron v. Kyte*, 3 Knapp, 332; *Hill v. Bigge*, 3 Moore, P.C., 476), has not a delegation of the whole Royal Power but has only those powers which have been delegated to him by the terms of his Commission. He would have no power, there-

fore, to assent to a Bill which, according to his instructions, ought to be reserved for the signification of the Queen's pleasure. It admits, in my opinion, of no doubt that if a Bill had been passed by both Houses for the condemnation and punishment of Sigcau without judicial warrant or trial, and without giving him an opportunity of appearing personally or by counsel before both Houses, such a bill would have been considered repugnant to the law of England, and would consequently have been reserved for the signification of Her Majesty's assent. Bills of pains and penalties are not unknown in the law of England, but they are treated as exceptional remedies for pressing evils and they cannot be considered as otherwise than repugnant to the general law of the land. At all events their repugnancy to the law would admit of no doubt in case they were passed, if it were possible to conceive of this being done, without previous notice to the parties concerned and without permitting them to defend themselves by counsel and witnesses. In the view, however, which I take of this case it is unnecessary to determine the constitutional question which has been raised by Mr. Juta. The Parliament of this colony has never yet passed, and it is not likely ever to pass, a Bill for the condemnation of an individual without any form of trial. If such a Bill should ever be passed and assented to by the Governor, without first submitting it to Her Majesty, the only ground upon which its validity could be supported would be that the Queen's assent must be presumed from the fact that it has been assented to in Her Majesty's name. No such presumption can arise in regard to a Proclamation issued by the Governor, for it would not in any case require the assent of the Queen or be assented to in her name. It is questionable, therefore, whether Parliament had any power to confer authority on the Governor to enact a law by Proclamation which if embodied in a Bill would have to be reserved for the Queen's assent. Assuming, however, that the Legislature had the power, the question still remains whether it has by means of the Annexation Acts delegated to the Governor authority to do what he has done by Proclamation. He has, I must repeat it, arrested, condemned, and sentenced an individual without the intervention of any tribunal, without alleging any necessity for such a proceeding, without first altering the general law to meet the case of that individual, and without giving him any opportunity of being heard in self-defence. The Proclamation does not even specify the particular offence of which he has been guilty. If it was not a criminal offence there exists a strong presumption in our law

against any construction of the Acts whereby an individual would be liable to punishment by means of a retrospective statute. If it was a criminal offence there is an equally strong presumption against a construction whereby an individual could be punished without the intervention of any judicial tribunal. None of the laws, which had been proclaimed in Pondoland East before the Act of Annexation, bore the slightest resemblance to the Proclamation whereby the petitioner was subsequently deprived of his liberty. That Proclamation does not introduce any general law which "shall be applicable to the territories" in the words of the previous Annexation Acts, or to which "the territories shall be subject" in the words of the Act of 1894, but it embodies a judicial decree against an individual. Under the Roman Empire it was said by *Ulpian* (*Digest* 1, 4, 1) that "the pleasure of the Emperor has the vigour and effect of law, since the Roman people, by the *Lex regia*, have transferred to their Prince the full extent of their own power and authority." His judicial capacity was merged in his legislative capacity and whatever decree he issued, after due inquiry, had the force of law. Even the Emperors, however, in theory, if not in practice, recognised the rule that laws should be construed as prospective not as retrospective, unless they are expressly made applicable to past transactions and to such as are still pending (*Code*, 1, 14, 7). The law of England upon these matters does not admit of any doubt. As far back as the reign of James the First it was held by Sir Edward Coke, with the approval of all the other judges, in the case of *Prohibitions*, that "the King cannot arrest any man" and that "the King in his own person cannot adjudge any case, either criminal or betwixt party and party, but that it ought to be adjudged and determined in some Court of justice according to the law and custom of England." As to the retrospective operation of statutes the Courts have adopted to its full extent the rule of construction of the Roman law. In the Dutch law the transfer of full legislative power to the Prince was unknown, except in the gravest emergencies, and judicial powers were always confined to the Courts of Justice. In this colony, also, the judicial functions of the Government have always been kept separate and distinct from its other functions. Executive functions are vested in the Governor acting with the advice of his Executive Council, legislative functions are vested in Parliament, and judicial functions in the Courts of law. Every statute by which legislative functions are delegated by Parliament to any other body should be strictly

construed. By the Pondoland Annexation Act Parliament has delegated the power of legislating for that territory to the Governor, who in this matter would act by advice of his Executive Council; but, without express words to that effect, it is impossible to hold that the power of exercising judicial functions, which has never yet been exercised by the Parliament itself, was intended to be so delegated. The exercise of such a power would not only deprive the subject of those safeguards which the Legislature has provided for his trial in the first instance for any criminal offence, but it would also prevent him from appealing for redress to this Court and, in the last resort, to Her Majesty in her Privy Council. Sigcau, it is true, is a native, but he is a British subject, and there are many Englishmen and others resident in the territories who are not natives, and who, if the respondents' contention be correct, would be liable to be deprived of their lives and property as well as their liberty otherwise than "by the law of the land." In support of the contention that the Legislature intended to confer such powers on the Governor the respondents greatly rely on the proviso to the 2nd section of the Pondoland Annexation Act, that all laws made under that Act shall be laid before both Houses of Parliament and shall be effectual, unless in so far as the same shall be repealed, altered, or varied by Act of Parliament. The Legislature, it is said, having reserved to itself the power of repealing the Governor's Proclamations, may fairly be held to have delegated to him the fullest powers of doing by Proclamation what the Legislature can do by Act of Parliament. There is some weight in this argument (assuming still that Parliament had the requisite power), but it does not outweigh the reasons which I have already given in favour of a more limited construction of the Act. I am not prepared to say that, under no circumstances, could the Governor by Proclamation make a law suspending the rights of the inhabitants of Pondoland East to personal liberty. That would at all events be a "law," in the sense in which the Legislature would understand the term, which could be confirmed or repealed without any judicial inquiry as to its necessity. Circumstances might even arise under which regard for the public safety which, in a certain sense, is the highest law, would oblige the Executive Government to override the ordinary laws of the territory, and, when they do arise, the Legislature would no doubt, by statute, indemnify the Government against the consequences. The Court has now to construe a statute which delegates only legislative powers to the Governor. It would, in my opinion,

be a strained construction of that statute to include among the laws which the Governor may declare by Proclamation criminal sentences passed on individuals at a time, moreover, when there was nothing to impede the ordinary administration of justice. The proviso affords no support to the view that the power was conferred on the Governor of exercising judicial, under the guise of legislative, functions. The Legislature, it is true, reserved to itself the power to repeal or alter laws made by Proclamation by means of formal Acts of Parliament, but it would surely have devised some simpler and more suitable mode of procedure if it had intended to include judicial decrees emanating from the Governor among such laws and to constitute itself a Court of Appeal or Review in respect of such decrees. The Proclamation for the arrest and imprisonment of the petitioner was issued on the 11th June, 1895. As soon as he heard of it he proceeded to Kokstad, where he arrived on the 18th June and immediately reported himself to the Chief Magistrate. He was forthwith confined in the gaol at Kokstad where he is still detained. On 22nd June the Governor appointed a Commission for instituting an inquiry, not into the original charge of "refusing to permit a duly authorised officer to discharge his lawful duty," but "into the acts and behaviour of the said Sigcau since the annexation." The Commissioners informed him that the inquiry was not to be a judicial one and he appeared before them under protest. On the 12th July they signed their report. In that report they say that "the Commission did not hold itself bound, either in the admission of evidence or the control of cross-examination, by the rules of evidence governing judicial proceedings. The result of their inquiry is summed up as follows: "We are of opinion, looking at the facts elicited as a whole, that Sigcau's conduct since annexation has been in many respects obstructive to the satisfactory magisterial administration of Pondoland, and that had his undoubtedly great influence over his people been unreservedly and loyally used in support of the new method of government being introduced among them, no serious difficulties would have arisen to interfere with the peaceable and orderly administration of the country. At the same time it appears that in many respects the attitude and conduct of the people, as a whole, have been praiseworthy. They appeared to have conducted themselves civilly towards the officials and troops stationed in the country. They have sold supplies to them, and erected huts, &c., on reasonable terms. Had they declined or refused to do so the occupation of the country would

have been much more difficult than it has been, and for this attitude and conduct the Chief should receive some credit. It also appears that in each instance, excepting the case of the Patekili fine and the submission of the Isiseli people and registration, where obstructive conduct was brought home to Sigcau and complained of to him he withdrew obstruction." Even in these excepted instances his obstructive conduct amounted to no more than this, that he did not cordially co-operate with the Magistrates, and that in his dealings with the Isiseli deputations he was too much intent upon maintaining his own personal dignity. After that report it would not have been surprising if Sigcau had been released, but he was informed by a letter from the Chief Magistrate to his legal advisers that Government had decided that he was not to return to Pondoland. The letter proceeds: "Two courses are in consideration, either that he shall remain in some place in the territories, in which case he would be placed in a spot remote from Pondoland and closely guarded, or that he shall be removed to the Colony and be located in some place on the mainland near Cape Town, where he would be given a residence, allowed a certain amount of personal freedom, and also be permitted to have the members of his family and attendants to reside with him. Explain this to him and ascertain what course he prefers." He preferred neither course, but, through his advisers, asked to be informed what crime he had committed, whether the sentence was meant to be exile from his country for the term of his natural life, or for what period, and in what spot in the territories—remote from Pondoland—the Government proposed to place him, or whether he was to be kept a prisoner in gaol. After waiting fourteen days for an answer, which was not vouchsafed, the petitioner gave notice to the respondent of the present application. The Attorney-General has said that the petitioner was ill advised in instituting these proceedings, but I fail to see what other course was open to him if he did not wish to remain an exile for the rest of his days. It is no proof of disloyalty to appeal to the Courts of law for protection against arbitrary punishment. On the contrary it is a hopeful sign when a native chief seeks by peaceful methods to obtain redress instead of arousing his clan to rebellion against the constituted authorities. If he had adopted violent measures he would have looked in vain for assistance from this Court, and I wish his advisers to tell him this, and if ever he should be found guilty of transgressing any of the laws of his country, this Court will be as ready to punish him with the heavy hand of the law as

it now is to protect him against illegal interference with his rights of personal liberty. This Court has been warned that the release of the petitioner might possibly endanger the peace of the country. A similar warning was addressed to the Court in 1878 by my present colleague, who was then Attorney-General, in the case of *Willem Kok and Others v. The Queen* (Buch., 1879, p. 45). In giving judgment I ventured to make the following remarks

‘It is said the country is in such an unsettled state, and the applicants are reputed to be of such a dangerous character, that the Court ought not to exercise a power which under ordinary circumstances might be usefully and properly exercised. The disturbed state of the country ought not in my opinion to influence the Court, for its first and most sacred duty is to administer justice to those who seek it and not to preserve the peace of the country. If a different argument were to prevail, it might so happen that injustice towards individual natives has disturbed and unsettled a whole tribe, and the Court would be prevented from removing the very cause which produced the disturbance.’ The Civil Courts have but one duty to perform and that is to administer the laws of the country without fear, favour, or prejudice, independently of the consequences which may ensue. The prisoners were released and none of the disastrous consequences which were confidently predicted ever ensued. In the present case there is no proof whatever that the territories are in a disturbed state but, even if they were, I do not believe that the impartial administration of justice would increase the disturbance or endanger the peace. It must tend to enlist the natives on the side of the law if they know that the Courts of law are as ready and willing to protect their legal rights as they are to punish them for offences against the law. With a full sense of the responsibility resting on this Court I am of opinion that the Proclamation relied on has not the force of law, and that the petitioner must be discharged from further custody.

Mr. Justice Upington in concurring said: I agree with every word that has fallen from my learned brother. If this had been a general law having a general effect, I should not consider myself bound to go out of my way to inquire closely into its validity; but where it is a special law affecting an individual. I take occasion to say that there is no duty cast upon me to maintain it, and as I consider in this case that it is repugnant to the principles of our law, I consider it my duty equally to dispose of it.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissin ; Government Attorneys, Messrs. J. & H. Reid & Nephew.]

SUPREME COURT.

[Before Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

ADMISSIONS.

Ex parte SMUTS. } 1895.
Aug. 1st.

Mr. Graham moved for the admission of Mr. John Christian Smuts as an advocate of the Supreme Court.

Mr. Smuts took the oath of allegiance, and was duly admitted.

Ex parte MALAN.

Mr. Close moved for the admission of Mr. Fran ois Stephanus Malan as an advocate of the Supreme Court.

Mr. Malan took the oath of allegiance, and was duly admitted.

PROVISIONAL ROLL.

SHARP V. SHARP.

Mr. Buchanan moved for provisional sentence on a mortgage bond for £2,100, with interest at 7½ per cent. from 6th October, 1893.

Provisional sentence was granted and the property declared executable.

SCHUNKE'S TRUSTEES V. JOHN AND CATHERINE VAN GASS.

On the motion of Mr. Buchanan the final adjudication of the defendant's estate was decreed.

TEUBES V. BURGER AND ANOTHER.

Mr. Buchanan applied for provisional sentence on a dishonoured promissory note for £176.

Provisional sentence was granted as prayed.

HIBERNIAN DISTILLERY V. CROWDER.

Mr. Benjamin applied for provisional sentence on two bills of exchange.

Granted.

HEARNS V. JACKSON'S EXECUTRIX.

Mr. Buchanan applied for the final adjudication of the defendant's estate. The provisional order was made on July 18.

Final adjudication decreed.

FLETCHER AND CO. V. JAMES.

Mr. Watermeyer applied under rule No. 329 for judgment, in default of appearance, for the sum of £70 for arrear rent, interest, and costs.

Judgment as prayed.

BAUTENBACH V. FERREIRA.

Mr. Close applied, under rule No. 319, for judgment in terms of declaration, and also asked that the Sheriff might be directed to pass transfer of the farm, the subject of the suit, as the defendant was in Lydenburg, S.A.R.

The Court granted judgment as prayed, but declined to give any directions to the Sheriff until the defendant had refused to obey the order of the Court.

SEAVILLE V. GROBBELAAR. { 1895.
Aug. 1st.

This was an application for an order restraining the respondent from disposing of certain land concessions in the district of Ceres in so far as applicant's rights are conceded pending an action in respect of the same.

The facts appear from the judgment.

Mr. Searle, Q.C., appeared for the applicant.

Mr. Innes, Q.C., appeared for the respondent.

The Chief Justice said: This is an application to restrain the respondent from parting with certain concessions referred to in the petition. An interdict of this kind can only be granted when the Court is satisfied that the respondent intends to part with the concessions, and it lies upon the applicant to show clearly that such intention has been expressed either by word or deed. To prove that there was that intention the arrangement between Wolfaart and Grobbelaar is relied upon, and it is said by that arrangement that Grobbelaar has given Wolfaart one-half of all the concessions. But when we refer to the document it is clear that the real meaning of the agreement is that Grobbelaar transfers to Wolfaart only one-half share of Grobbelaar's own share. That is the real meaning of it, and I cannot find that Grobbelaar himself understood it otherwise. In fact as soon as he found that Wolfaart understood it otherwise he repudiated it, and clearly showed he put the same construction on the document as we do, and that construction is the correct one. That is really, after wading through the whole of this evidence, the only fact that can be relied upon as bearing on the statement that the respondent intends to act improperly with regard to these concessions. Under these circumstances no ground for an interdict has been shown, and the application must be refused with costs.

[Applicant's Attorney, Gus. Trollip; Respondent's Attorneys, Messrs. Scanlen & Syfret.]

HAYWARD V. HAYWARD.

Mr. Tredgold moved to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights.

Application granted.

IN THE MATTER OF THE ANTE-NUPTIAL CONTRACT OF HENRY WARREN AND JANIE TEMPLAR.

Mr. Benjamin applied for an order authorising the amendment of the said ante-nuptial contract by describing certain erf of land situate in Umtata-road, in the township of Cala, settled on the intended spouse, as being numbered No. 228, instead of No. 330, as wrongly described in the contract.

The Court granted the application.

IN THE ESTATE OF THE LATE MARGARETHA L. J. LE ROUX AND SURVIVING HUSBAND.

Mr. Juta, Q.C., applied for authority to Christian M. Lind to resign his trust as *curator ad litem* to the minor children of Abraham J. Wannenburg in proceedings instituted to determine the intent and meaning of the will of the said Le Roux and surviving husband, a curator for such purposes having been previously appointed.

Granted.

ASHBURNER V. ASHBURNER. { 1895.
Aug. 1st.

This was an application on notice by Mrs. Mary Ashburner, calling upon her husband Major-General John Ashburner, of Knor Hoek, Sir Lowry Pass, to show cause why he should not supply her with sufficient funds to enable her to institute an action against him for maintenance and support, and further why the respondent should not be ordered to pay the costs of the application. It appeared from the affidavit in support of the application that the applicant at present resides at Oberbozen, near Bozen, Austria.

That the respondent is a retired Major-General in receipt of a pension of over £400 a year.

That the applicant was compelled to separate from the respondent before he came to this colony in consequence of his cruelty, and that she has lived apart from him for the last twenty-five years.

That from the date of their separation until February, 1887, the respondent contributed towards the applicant's support and maintenance. On the last-mentioned date the respondent stopped his wife's allowance, and shortly afterwards instituted an action against her for divorce on the ground of malicious desertion.

The action was afterwards withdrawn, and an arrangement came to under which the respondent agreed to pay his wife £8 10s. per month.

This amount was paid until August, 1892, when it was stopped, the respondent intimating that he was desirous that his wife should leave Austria and join him at the Cape, but he declined to provide her with sufficient funds.

The applicant is now over sixty years of age, almost blind, and utterly destitute.

After the notice of motion had been served, certain correspondence passed between the respective attorneys, and the respondent made an offer of £6 10s., subsequently increased to £8 10s., a month towards his wife's support, but declined to pay any arrears since August, 1892. The applicant's attorneys declined to accept this offer without a direction from the Court, and the matter now came before the Court for final settlement.

Mr. Sheil appeared for the applicant.

Mr. Graham appeared for the respondent.

The Chief Justice said: There will be no order on this application in consideration of the respondent undertaking to pay to the applicant the sum of £8 10s. per month, the first payment to be made to-morrow, and future payments on the first of every month. The respondent must pay the costs up to and including June 27, the date of the notice of motion. No order will be made as to the subsequent costs.

[Applicant's Attorneys, Messrs. J. & H. Reid & Nephew; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

Before Sir HENRY DE VILLIERS, K.C.M.G.,
(Chief Justice), and Mr. Justice UPINGTON,
K.C.M.G.]

MYBURGH V. GREEN. } 1895.
Aug. 2nd.
„ 3rd.

Farm—Action to compel transfer—Costs.

This was an action to compel transfer of a farm and for damages instituted by Christoffel P. H. Myburgh against Mrs. Wilhelmina H. Green. The declaration alleged that during the month of December, 1894, the defendant sold and the plaintiff purchased the farm Karmelkspruit, being a certain piece of perpetual quitrent land situate in the division of Aliwal North being the remaining extent of the farm Karmelkspruit, measuring, as per remaining extent, about 800 morgen, for the sum of £1,600.

Thereafter on 26th November, 1894, and in pursuance of the contract, the plaintiff paid to the defendant by the hands of her lawful attorney, one P. M. Fitzgerald, of Lady Grey, the sum of £1,600, being the purchase amount, and entered into possession of the farm and paid the transfer duties, amounting to the sum of £64.

Thereafter the defendant, though requested, refused and still refuses to pass transfer of the farm to the plaintiff, and the plaintiff has been unable through her unlawful act to obtain transfer thereof.

The defendant has wrongfully and unlawfully come upon the farm, and in violation of the plaintiff's just rights has wrongfully and unlawfully pulled down and taken away certain shop-fixtures and partitions, and has locked up certain premises thereon, and deprived the plaintiff of the use thereof, and has otherwise by reason of her unlawful refusal to pass transfer caused the plaintiff irreparable loss and damage in the sum of £100 sterling.

The plaintiff claimed:

(a) That the defendant be forthwith ordered to pass to the plaintiff transfer of the farm, he tendering to do all necessary acts to obtain transfer of the same.

(b) £100 damages arising from the unlawful trespass and unlawful refusal to pass transfer of the said farm.

(c) Alternative relief and costs.

The defendant, after admitting the formal allegations in the declaration, specially pleaded that on 19th October, 1894, she entered into an

agreement in writing with one Keese for the sale to him of the farms Nooitgedacht and Karmelkspruit.

One of the conditions of the agreement was that if Keese carried out his portion thereof in regard to the payment of the purchase price, then in such case the defendant agreed to pass transfer of the portion of Karmelkspruit to the plaintiff for the sum of £1,600.

The plaintiff was aware of the agreement, and assented thereto, and Keese acted as his agent in the matter, and the plaintiff has no right to claim transfer of the property unless, and until, Keese has carried out his portion of the agreement.

Keese has wholly failed to carry out the said agreement, and has not paid the purchase price, as stipulated therein.

The defendant is willing to pass transfer as soon as the agreement is fully performed.

The plaintiff in his reply said that he had no knowledge of the agreement referred to in the plea, and denied that Keese was his agent.

Mr. Molteno and Mr. Sheil appeared for the plaintiff.

Mr. Searle, Q.C., and Mr. Watermeyer for the defendant.

The material clauses of the agreement, which only bore Keese's signature, referred to in the plea were as follows:

2. The purchase price shall be the sum of £6,200, to be paid or settled as follows:

(a) The sum of £2,612 10s. by cession of certain bond for £2,500, with interest at six per cent. from 1st February, 1894, calculated to 31st October, 1894, to be ceded through the purchaser by one Oosthuizen to the seller, being all the right, title and interest of the said Oosthuizen to the said bond and interest as a first mortgage upon the farm Pelion in the district belonging to one G. E. Mandy, in extent about 2,500 morgen.

* * * * *

(c) The sum of £1,600 in cash on the said 1st November, 1894, being the amount payable by one Myburgh as in paragraph 6 hereof referred to.

* * * * *

6. That so soon as the sum of £4,600 is paid or arranged in the manner aforementioned and such arrangements complete and perfected by due payment, cession and registration as aforesaid or referred to, then the seller agrees to pass transfer of the portion of Karmelkspruit to one Myburgh for the sum of £1,600.

Mr. A. E. Orsmond deposed that he was a law agent, and represented the firm of Sauer & Orsmond at Lady Grey. In July, 1894, the plaintiff consulted and requested him to buy the

farm Karmelkspruit for £1,600 direct from Mrs. Green. Some time afterwards he saw Mrs. Green and offered her £1,600 for the farm, which she declined. He next saw Mrs. Green on 1st November and mentioned the matter again. She then said that the matter had not been arranged with Keese, but after an interview with Keese, she referred witness to her son and attorney, Mr. P. M. Fitzgerald, of Lady Grey, who was then in Cape Town. Witness saw Fitzgerald shortly after his return from Cape Town, and Fitzgerald told him that the matter with Keese was arranged, and that Myburgh could get transfer of the farm on payment of the £1,600.

On 26th November witness and Myburgh went to Fitzgerald's office and examined the documents, but found that the power to pass transfer had not been signed by Green, the defendant's husband. This was subsequently done, and on the 29th November witness paid the £1,600, and obtained a receipt. The declarations of purchaser and seller were filed with the Resident Magistrate. He put in the receipt for transfer duty. Subsequently the defendant wired to the Registrar of Deeds revoking the power to pass transfer.

In consequence of the delay the plaintiff had to raise a bond in Cape Town on which he was paying interest. He also had to pay interest on the renewal of a promissory note, first at 9 per cent. and afterwards at 8½ per cent., whereas if the transfer had gone through at once he could have raised the money on mortgage at 6 per cent.

Cross-examined: He understood from Mrs. Green, on the 1st November, that she would not sell Karmelkspruit to the plaintiff unless she also sold her farm Nooitgedacht to Keese; that she would not sell one farm without the other; but it would be untrue if Fitzgerald stated that he, on the 26th November, told witness that such was the condition of the sale on that date. On the contrary, he said that matters with Keese had been fixed up.

By the Court: He was quite sure he never saw the agreement between Keese and Mrs. Green.

Christoffel Petrus Hendrikus Myburgh, the plaintiff, deposed that he approached Mrs. Green as far back as July of last year, being anxious to purchase Karmelkspruit. Finally the sale was arranged, quite irrespective of anything relating to Mr. Keese. He took possession of the farm on the same day he purchased it, but Mrs. Green reserved fourteen days in which to drive off her cattle, but she did not do so, and witness remonstrated with her. He would never have paid over the £1,600 if the sale had been on the condition that Keese had first to pay his instalments on the farm Nooitgedacht.

Cross-examined : He knew that Keese intended buying Nooitgedacht, but it was not agreed between himself and Keese that if he (witness) bought the farm Karmelkspruit and Keese bought Nooitgedacht, he (witness) would not open a shop. Mr. Fitzgerald did not tell witness in November that Keese had agreed under certain conditions to pay £6,200 for the two farms, £1,600 of which was for Karmelkspruit. Mrs. Green in the first instance said that she would not take less than £2,000, but afterwards she offered the farm for £1,600 if Keese bought Nooitgedacht for £1,600. Witness denied that Keese had ever acted as his agent.

An official from the Deeds Office put in the powers to pass transfer, and the transfer deeds passed by Mrs. Green in favour of Keese, transfer of the farm Nooitgedacht having been passed to him on June 14, 1895.

Patrick Michael Fitzgerald was called on behalf of the defendant, and deposed that he was an attorney practising at Lady Grey, and acted for Mrs. Green and Mr. Keese in the matter. He was now prepared to pass transfer, as matters between Keese and Mrs. Green had been satisfactorily settled.

The Chief Justice said that the time of the Court had been wasted about nothing. It was now agreed to pass transfer, and the fact had now for the first time been stated. It was now only a question of costs.

Continuing, witness said that with regard to the damage alleged to have been sustained by the plaintiff in having to borrow money at 9 per cent. instead of 6 per cent., that was not incurred with the knowledge of the defendant, nor was she responsible for it.

Cross-examined : He parted with the power of attorney to enable the transfer to be completed, because he thought at the time that Mrs. Green was bound to give transfer to Myburgh on payment of the £1,600. All the necessary documents were in order when the £1,600 was paid ; but there was the bond held by Mr. Oosthuizen, which was a second and not a first mortgage as Mrs. Green had imagined, that led to the transfer not being completed. The money was not returned as Myburgh refused to give up possession.

Re-examined : Myburgh had not been disturbed in possession further than that he had received the demand from Mrs. Green to withdraw.

Mr. Orsmond, witness for the plaintiff, was recalled and examined by the Court : Fitzgerald on the 29th May told him that he had wired to the Registrar of Deeds in Cape Town to pass transfer. He nevertheless allowed the action to go on without saying a word about it, as, if the

Registrar of Deeds passed transfer, it would have come through Fairbridge & Arderne and Sauer & Orsmond in the proper course. Besides, he did not know whether Fitzgerald had really sent the telegram or not. Fitzgerald soon afterwards said the matter had better be settled, each party paying their own cost, but witness declined and wanted Fitzgerald to pay all the costs. He knew, therefore, that transfer was ready to be completed on the 29th May.

Louis Frederick Keese deposed that he was a merchant at Lady Grey. The purchase of the farm Nooitgedacht by witness and of the farm Karmelkspruit by Myburgh was, according to the agreement drawn up, a joint transaction, and one farm was not to be sold without the other. Karmelkspruit would be worth more than the £1,600 to Myburgh, who had a farm adjoining.

Cross-examined : He was aware that Mrs. Green was a very litigious woman, but he did not know how many actions at law she had been engaged in.

The Chief Justice : Even litigious people are sometimes in the right.

By the Court : Myburgh did not know that if any obstacles arose to his (witness) getting transfer of Nooitgedacht, he (Myburgh) would not get transfer of Karmelkspruit. He was never appointed Myburgh's agent.

John Green, husband of the defendant, deposed that the plaintiffs came to him requesting him to sign the power, and saying it was only a conditional affair. Witness refused, but subsequently, at the request of his wife, he signed.

Mrs. Green was called, and stated that the value of the fixtures removed by Botha was trifling.

Judgment was given for the plaintiff with costs.

The Chief Justice said : This is an action to compel the defendant to pass transfer of the farm Karmelkspruit, alleged to have been purchased by the plaintiff from the defendant, and there is a further claim for damages, but the damages are not now pressed. The defence raised by the defendant is virtually this : that the sale was a conditional one, and one of the conditions was that if a certain Keese carried out his agreement with regard to the payment for another farm called Nooitgedacht, that in that case only the plaintiff would be entitled to the transfer of Karmelkspruit. Now, in my opinion this condition has not been proved. It is quite true that a letter embodying some of the conditions was shown by Keese to Myburgh before the sale to Keese went through, but Keese, who was called as a witness

for defendant herself, states that the condition which was incorporated in the subsequent agreement between him and Mrs. Green was not in the letter that he showed to Myburgh; namely, the condition that the sale to Myburgh was only to take effect in case proper arrangements could be made with Keese. But even if it were otherwise, even if there had been such a condition, the defendant, in my opinion, entirely waived it on the 29th November, 1894. Mrs. Green, the defendant, had referred the plaintiff to her agent Fitzgerald. Orsmond, the plaintiff's agent, went to Fitzgerald, and on the 26th November he refused to pay the purchase price unless there was a power of attorney signed by Mrs. Green, and with the consent of her husband. On the 29th November the required power of attorney was completed; an unconditional power of attorney was then given to the plaintiff by Fitzgerald, and an unconditional receipt was also given by the defendant. Now it is contended that up to that time Mrs. Green had refused to recognise Myburgh in the matter, but that statement is quite inconsistent with the receipt of the 29th November, which runs: "Received from Messrs. Sauer & Orsmond, for Mr. Myburgh, the sum of £1,600 sterling, being the purchase price of Karmelkspruit." Now here is a clear admission that she was dealing direct with Myburgh, and that she had received the sum of £1,600 from Myburgh as payment for the farm he had bought from her. Nothing is stated of any conditions, so that even if there had been any conditions before, these conditions were waived on the 29th November, when the unconditional power of attorney was given, and the unconditional receipt also given. Clearly, therefore, from that time the plaintiff was entitled to transfer, but on the 18th December a hitch seems to have occurred, and a letter was then sent by Mrs. Green to Myburgh, in which, judging from the answer sent, there must have been a claim that she should get possession of the farm again. On the 22nd December the answer was sent by Sauer & Orsmond, "We are instructed by Mr. Myburgh to acknowledge the receipt of your letter, and to inform you that, as you are aware, the sale by you to our client was a cash transaction. Our client paid you the purchase amount therefor, £1,600, and thereupon took possession of the property. There were no conditions or stipulations save and except the right that you had to remove your stock, and further, we have to inform you that our client has nothing to do with any misrepresentations made by any person, and our client refuses to hand you over the farm." Well, after that letter had been sent by

the plaintiff, he, in my opinion, was fully justified in claiming transfer forthwith; the question of his rights was raised, and he was, therefore, quite entitled to bring his action. And then the Registrar of Deeds also had been requested not to pass transfer, and these circumstances justified the plaintiff in bringing the action. On the 28th May all the differences between Mrs. Green and Keese had been settled, and Mr. Fitzgerald then telegraphed to the Deeds Office that the transfer might then pass, but instead of communicating this fact to his attorneys in Cape Town he merely, by oral communication, informed Orsmond that the transfer could pass. Then, strange to relate, Orsmond also remained perfectly silent, and gave no information to his Cape Town attorneys. If that is the way country business is carried on no wonder litigation and difficulties of this kind arise. One would think that the attorneys on both sides would have put an end to this unnecessary litigation, but they sat still and coolly allowed the litigation to proceed in Cape Town. Now, it comes to a mere question of costs. Well, in my opinion, we must decide the matter strictly between the parties. Up to the 28th May, the defendant was, in my opinion, entirely in the wrong, and therefore, being in the wrong, it was the duty of the defendant to set matters right. It was the duty of the defendant to give due notice to all the parties that the transfer was to go through, and to tender to the plaintiff all the costs which had been incurred up to that date; and in the absence of any such tender, in strict law the plaintiff was entitled to proceed with his action. If Mr. Myburgh himself were to blame in this matter, I should certainly hesitate to give him his costs; but I do not think he ought to be punished for the carelessness of his agent (Orsmond), especially as it is a question of carelessness on both sides. And now as it comes to a strict question of law as to who is entitled to costs, and as the plaintiff has succeeded in the action, and inasmuch as there has been no tender to submit to judgment—because that ought to have been the tender—and pay costs; in the absence of such tender we must give judgment compelling the defendant to pass transfer and to pay the costs of this action.

Mr. Justice Upington: I have no doubt on the question. What I should have advised the defendant on the 28th May, would have been to have said that some paltry matter of costs had been incurred, and that they had better be paid and have done with the question.

Mr. Molteno applied for plaintiff's witnesses' expenses, which were allowed.

[Plaintiff's Attorneys, Messrs. Sauer & Standen; Defendant's Attorneys, Messrs. Fairbridge Arderne, & Lawton.]

REGINA V. ALBERT. { 1895.
Aug. 5th.

Child—Criminal responsibility—Obedience to father.

A child under fourteen years of age, who assists his father in committing a crime, is presumed to do so in obedience to his father's orders, and is not punishable, even if he knew that he was doing a forbidden act, unless, in the case of a child above seven, the crime was so heinous as obviously to absolve him from the duty of obedience.

This case came on review before the Chief Justice, as Judge of the week, from a sentence passed upon the prisoners by the Resident Magistrate of Somerset West.

De Villiers, C.J.: Among the cases submitted to me as Judge of the week was that of Hendrik and John Albert, father and son, who were convicted of the theft of two bags of oathay. The father was sentenced to a month's hard labour with spare diet on two days in each week and the son to receive twelve cuts with a cane. The son was only eleven years of age and assisted his father in taking the oathay from a loft. There is no evidence that the father actually ordered the son to assist him, but it may fairly be presumed that he did. Now there is a rule of law that "he is free from blame who is bound to obey" (*Dig* 50, 17, 169). This rule, as pointed out by *Matthæus* (*De Crim.* 1, 13), must be accepted with the limitation that the offence is not so heinous as obviously to absolve the person ordered to commit it from the duty of obedience. No assistance can be derived from the English law, which, in regard to crimes committed under compulsion, is most unsatisfactory. According to *Stephen* (*History of Criminal Law*, Vol. II., p. 106): "As the law stands it produces this result. A husband and wife of mature age, and their daughter of fifteen, commit a theft. It is proved that the girl acted under actual threats used by her father. Nothing appears as to the wife's part in the matter except that her husband was present when she committed the offence. The wife must be acquitted on account of the presumed coercion of her husband; the daughter must be convicted, notwithstanding the actual coercion of her father." Even in England, however, there are, according to Sir M Hale (*P.C.*, 44), various crimes, such as those which

are *mala in se*, from the punishment of which the wife is not privileged on the ground of coercion. As to our own law, I am not prepared to adopt the English rule that a wife who commits a theft in the presence of her husband must be presumed to have acted under his coercion. That rule was referred to but not accepted by the majority of the Court in *Queen v. Barker* (2 Juta, 9). The Court has now to deal with the case of a child of eleven years assisting his father in committing a theft. It cannot be reasonably expected from a child under fourteen that he will disobey the illegal orders of the father unless the offence he is ordered to commit is of an atrocious kind. If he has reached the age of fourteen he is presumed to have sufficient discernment between right and wrong and sufficient strength of will to disobey unlawful orders. If he is under seven he is absolutely free from criminal responsibility. But between seven and fourteen, although he is presumed to be *doli incapax*, that presumption may, as was held in *Queen v. Lourie* (9 Juta, 432), be rebutted by evidence to the contrary. In the present case there is no such evidence to the contrary, but, even if it had been proved that the child knew he was doing a forbidden act, the question still remains whether he would have been criminally responsible. I am clearly of opinion that he would not be so responsible. The offence of assisting his father in removing two bags of oathay was not so heinous as obviously to absolve the child from the duty of obedience. The verdict and sentence on the child John Albert must therefore be quashed.

RENFREW V. RENFREW. { 1895.
Aug. 5th.

This was an action for divorce on the grounds of the defendant's adultery.

Mr. Graham for the plaintiff.

Defendant appeared in person.

Mrs. Renfrew, the plaintiff, deposed that she was married to the defendant, after an acquaintance of three months, at Newlands, on the 7th May last. She was a widow with two children—a boy and a girl. They lived happily together until the 20th June, when his conduct altered. He stayed out a good deal at night, and did not come home to his meals. On the 10th July he confessed having misconducted himself with a Mrs. Inkelking, and on the 12th July she filed her petition.

By the Court: Her children had lived with her throughout. She married the respondent under ante-nuptial contract.

The defendant here said that he did not defend the case, and a decree was granted with costs.

BROOKFIELD V. BROOKFIELD. } 1895.
 Aug. 5th.
 Adultery -- Divorce -- Admission -- Evidence
 -- Admissibility of record of suit to which
 defendant was not a party.

*B. sued his wife for divorce on the grounds of
 her adultery with M.*

*B.'s wife in a letter to her husband admitted
 that she had committed adultery with M.*

*At the trial B.'s counsel asked leave to use as
 evidence the record in a case, in which M.'s
 wife sued M. for, and obtained, a decree of
 divorce on the grounds of his adultery with
 B.'s wife although the latter was not a party
 to that suit.*

*Held, that the record was admissible as evi-
 dence against B.'s wife.*

 Action for divorce on the grounds of adultery.

The intendit alleged that the parties were
 married on 31st December, 1889, at St. John's,
 Waterloo Road, Lambeth, in the county of
 London, England.

That at divers times during the year 1892 and
 1893, and especially during the month of
 December, 1892, and at Pretoria, the defendant
 committed adultery with one John Mayhew,
 with whom defendant lived as his kept mistress.

The plaintiff, Ernest Oliver Brookfield,
 deposed that he and his wife came to the
 Colony shortly after his marriage, and that they
 lived together in Cape Town until June, 1892,
 when his wife went, with his consent, to East
 London to accept the position of a barmaid.
 After being about a fortnight in East London
 she returned to Cape Town, and subsequently
 went to Pretoria where she was employed as a
 barmaid at a salary of £20 per month.

Not hearing from his wife he went to Pretoria
 on the 28th or 29th December, 1892. He saw
 his wife in Mayhew's bar, where she was
 employed, but she refused to tell him where she
 was living or to cohabit with him.

One night at half-past twelve he saw his
 wife and Mayhew leave the latter's bar. He
 spoke to his wife and asked her to accompany
 him to his hotel but she refused.

Subsequently he received letters (put in) from
 his wife in which she admitted her adultery
 with Mayhew.

On 15th February, 1893 in the High Court,
 Pretoria, Mrs. Mayhew obtained a decree of
 divorce on the grounds of Mayhew's adultery
 with Mrs. Brookfield.

Mr. Maskew on behalf of the plaintiff applied
 for leave to put in the record in the case
Mayhew v. Mayhew as evidence against the
 defendant

The Chief Justice: How can the record in
 that case be used as evidence against the defen-
 dant, who was no party to that suit.

Mr. Maskew: She was not a party to that
 suit, it is true, but her admission that he was
 living with Mayhew is sufficient to identify her
 as the Mrs Brookfield referred to in that case,
 and with whom the Court found that Mayhew
 had committed adultery.

The Court granted the decree.

The Chief Justice said: The admission of the
 defendant in her letters to the plaintiff that she
 had committed adultery with Mayhew justifies
 the Court in accepting, as evidence, the record
 in the case of *Mayhew v. Mayhew*, although the
 defendant in this case was not a co-defendant in
 that suit. Further her admission of guilt is
 strengthened by the evidence of the plaintiff,
 who swears that he saw his wife and Mayhew
 leave the latter's bar at half-past twelve at
 night, and that when requested, she refused to
 give her husband her address or accompany him
 to his hotel. Under these circumstances the
 evidence of adultery is sufficient to justify the
 Court in granting a decree of divorce as prayed.

[Plaintiff's Attorneys, Messrs. Sauer &
 Standen.]

 HALL AND ORSMOND V. FITZ- } 1895.
 GERALD. } Aug. 5th.

Trustee—Misconduct—Insolvent estate.

*The first duty of a trustee of an insolvent
 estate is to advance the interests of the
 estate which he administers, and if he wil-
 fully damages such interest, in order to
 advance his own, he is guilty of misconduct.*

*At the third meeting of creditors of an
 insolvent estate a resolution was proposed
 that a certain auctioneer should conduct the
 sale of the assets, to which the respondent,
 one of the trustees, acting under powers of
 attorney, proposed and seconded an amend-
 ment that he should himself be the auc-
 tioneer.*

*The original resolution having been carried,
 his co-trustee advertised the sale, but on the
 day advertised the respondent appeared and
 did everything in his power to obstruct the
 sale and prevent its being a success.*

*He also proceeded with litigation against the
 wishes of his co-trustee,*

On the application of certain creditors the respondent was removed from his trust.

This was an application by Hall and Mandy, jun., who are unsecured creditors in the estate of one G. E. Mandy, against P. M. Fitzgerald, one of the trustees in the estate under section 52 of the Insolvent Ordinance, to have him removed from his office by reason of misconduct.

The grounds relied on by the applicants were:

(a) That the respondent had wilfully acted to the detriment of the general body of creditors.

(b) That he had been guilty of misconduct in connection with the sale of the assets to the detriment of the estate.

The material facts are as follow.

The estate was sequestrated on 15th November, 1894, and the second meeting was held on 5th December, 1894. The respondent (who had been provisional trustee) and one A. C. Orsmond were elected trustees.

The second-named applicant is a son of the insolvent. He had been living on his father's farm and worked it for some time, and when the estate was surrendered he claimed a share of the growing crops which he began to reap. He also took possession of certain stock on the farm which he said belonged to him.

On 7th February, 1895, the trustees obtained a rule nisi from the Court restraining Mandy, jun., from interfering with the assets of the estate. The rule was made returnable on 21st February. In the meantime the third meeting had been called for 20th February. At this meeting the trustees presented their report. One of the special objects of the meeting was to give the trustees directions as to the management and liquidation of the estate. Fitzgerald proposed the adoption of the report. He represented concurrent creditors whose claims amounted to £825, and he also claimed to vote for a bond creditor, one J. E. C. Oosthuysen, for £2,500, by virtue of a power signed 24th November, 1894. Attorney Smuts objected and produced a later power, signed by Oosthuysen in his favour on 18th February, 1895, but it was signed J. E. and not J. E. C. Oosthuysen. The respondent thereupon raised the point that the signature was not that of the same person. The Resident Magistrate took the statement of a Mr. Du Toit who saw the power signed, and who declared that it was the signature of Oosthuysen, but in view of Fitzgerald's objection he adjourned the meeting until 26th February for Oosthuysen to appear and settle the point.

In the interim the Magistrate wrote to Oosthuysen and received a reply dated 25th February, in which he confirmed his signature to the power of 18th February, and gave his reasons for signing it, which were:

(a) That Fitzgerald was involving the estate in useless litigation.

(b) That he wanted the sale to be entrusted to an inexperienced auctioneer (his own clerk).

At the meeting held on the 26th February, the Magistrate stated that he was satisfied with the genuineness of Oosthuysen's power of 18th February.

Fitzgerald then produced a third power in favour of one Keese, who substituted Fitzgerald, dated 21st February, 1895, and wished to use it. The Magistrate refused to allow him to do so, holding that two powers had already been put in, and that the meeting had only been adjourned to discuss the authenticity of the second power. The circumstances under which the third power was given were explained by the respondent as being that there was an old agreement that Oosthuysen would exchange with Keese his bond for £2,500 for a similar bond on another farm.

At the adjourned meeting it was carried by a majority of creditors that the dispute with Mandy, jun., as to the crops, &c., should be compromised and all legal proceedings withdrawn. A resolution was then carried settling the terms of sale, which was that the farm and other assets should be sold in Lady Grey. Fitzgerald proposed as an amendment that the sale should take place at the farm and that he should be the auctioneer.

The respondent alleged that certain of the creditors (his mother, Mrs. Green. and his step-father and Keese) wished him to continue the legal proceedings against Mandy, jun., and offered to indemnify him. His co-trustee Orsmond wished to obey the resolution of creditors and refused to be a party to further litigation.

Fitzgerald then proceeded alone and on 12th March, after a number of affidavits had been filed, the Court discharged the order, but ordered the costs to come out of the estate.

Meanwhile Fitzgerald, on behalf of Keese, wrote on the 26th February to the Magistrate protesting against his ruling, and in March 1895, he petitioned the Court to reverse the decision of the Magistrate *re* Oosthuysen's power and to declare his (respondent's) motion at the meeting carried. This application was unsuccessful.

The sale of the assets was fixed for 4th May.

On 9th April, a letter was sent to the trustees asking them to call a special meeting to rescind

the resolution of the third meeting. This letter was signed by Keese and Fitzgerald (the applicants alleged that the other creditors were not consulted in this matter).

Orsmond the co-trustee refused to sign the notice for a special meeting. The respondent then forwarded a notice signed by himself to Cape Town, and the Master authorised a special meeting understanding that the notice would be signed by both trustees. This was not done and the Magistrate declined to proceed with the matter.

On the day of the sale Fitzgerald attended and warned the intending purchasers not to buy, and told them that if they did buy no delivery would be made. The sale however went through.

The respondent in his affidavits alleged, *inter alia*, that there was a conspiracy on the part of Orsmond and Smuts to deprive him of his trusteeship. He said that the majority of the creditors allowed the insolvent to violate the law and stifle legal proceedings. He asserted that the applicant Mandy, Smuts, and Orsmond were interested in upholding the resolutions passed at the third meeting, that Oosthuysen's second power was obtained by fraud, and that the postponement of the sale would not have prejudiced the estate nor did his conduct prejudice it, and that the administration of the estate was complete.

Orsmond, Smuts, and Oosthuysen filed affidavits in reply denying these charges.

Mr. Rose-Innes, Q.C., for the applicants.

Mr. Juta, Q.C., for the respondent.

The application was granted.

De Villiers, C.J.: The object of the present application is to have the respondent removed from his trusteeship on the ground of his misconduct. The evidence shows that ever since the insolvency of Mandy there has been a dispute between the two trustees appointed. For a short time they did act together, but very soon differences occurred. Litigation was commenced by both, and subsequently revoked by one of them. The respondent continued the litigation in what to my mind appears a perfectly needless fashion. Several meetings of creditors were held, but at the third meeting final resolutions were arrived at by the creditors, one of which was that the sale of the property should take place in a particular manner, and that a certain auctioneer should conduct the sale. At that meeting the respondent proposed an amendment to the effect that he himself should be the auctioneer. He proposed it in one capacity, and seconded it in another, but his amendment was lost and the original resolution was carried. That resolution was never revoked. An attempt was, no doubt,

made to call a special meeting for the purpose of reconsidering the resolution arrived at, but that special meeting has not been held, and the resolution has not been cancelled. It may therefore be taken that the creditors instructed that the sale should take place in a certain manner, and that the auctioneer should not be the respondent. There seems to have been some delay in fixing the date of the sale, but ultimately it was fixed for the 4th May, and in the advertisements announcing the sale the name of the respondent appears as one of those authorising the sale. Now I cannot believe that these advertisements were never brought to the notice of the respondent. When the day arrived for the sale the respondent was there, and did everything in his power to obstruct the sale and prevent its being a success. This conduct was wholly reprehensible. The first duty of a trustee is to advance the interests of the estate which he administers, and it is only a secondary duty to advance his own interests. But, in my opinion, the respondent in this case has looked only to his own interests, regardless altogether of the interests of the estate. That is, in my opinion, sufficient misconduct on the part of a trustee to justify the Court in ordering his removal. The Court will therefore grant the order as prayed, the costs of this application to be paid by the respondent *de bonis propriis*.

Mr. Justice Upington concurred.

[Applicants' Attorneys, Messrs. Van Zyl & Buissinné; Respondents' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

LIEBETRAU V. LIEBETRAU. { 1895.
Aug. 5th.

Husband and wife—interdict.

A wife, married out of community of property, advanced her money to her husband to enable him to purchase certain land but obtained no security for the loan.

Thereafter she instituted an action against him for divorce on the ground of incest and for a refund of the money, and, having ascertained that he was about to alienate the property, she applied for an interdict to restrain him from alienating or mortgaging the land pending such action.

Held, that the husband's marital power did not debar the wife from the relief sought, and that, as no creditors would be injured thereby, she was entitled to a temporary interdict.

This was an application for an interdict restraining the respondent from alienating or mortgaging certain landed property registered in his name.

The petitioner and the respondent were married without community of property (the marital power was not expressly excluded in the contract) in February, 1889, the petitioner being then the widow Snibbe.

The respondent had little or no property at the time of the marriage, whereas the petitioner was possessed of £700.

Towards the end of 1890 the respondent purchased certain land which he had registered in his name, the purchase price (£850) being advanced to him by his wife.

Thereafter she advanced him a further sum of £279 17s. 5d.

In 1892 the respondent mortgaged the property for £50.

On the 5th July last the respondent was charged with the crime of incest (for having committed adultery with one of the petitioner's daughters by her first husband) and committed for trial by the Resident Magistrate of Stellenbosch.

The petitioner alleged that she believed her husband would plead guilty to the charge of incest, that he was now out on bail, that he had obtained possession of the transfer deeds of the property and that he was about to mortgage the same to one Hunt for £100, and that she was about to institute an action against him to recover the moneys which she had advanced to him. (Her counsel stated that she was also about to institute an action for divorce.)

The prayer was for an order restraining the respondent from mortgaging the property and the Registrar of Deeds from registering any mortgage against the property.

The respondent in his replying affidavit alleged, *inter alia*, that the sum of £350 (the first advance) was a gift to him from his wife to buy the land, and he denied having received the amount of the second advance, or that he intended to plead guilty to the charge of incest.

The applicant in her replying affidavit denied having made a gift of the £350 to the respondent.

Mr. Juta Q.C., for the applicant.

Mr. Graham for the respondent. As the marital power has not been excluded in the contract the law gives the respondent the right to administer the property subject to his being restrained in case he is making a wrongful use of his power.

In the present application the applicant has no *locus standi*. The rights of creditors might be seriously affected by granting the order. He cited *Steytler v. Dekkers* (2 R., 98).

De Villiers, C.J.: No question really arises in this case as to the marital powers of a husband in dealing with his wife's property. The land of which the plaintiff seeks to interdict the transfer pending an action is registered in the name of the defendant himself. He paid £700 for the land, but as he had no money of his own the plaintiff advanced all her money for the purpose. If she had stood in a different relationship towards him she would have taken some security for her advance, but, as it is, she has no security whatever. She now alleges that she intends to bring an action against him for divorce on the ground of incest and for a refund of the money advanced, and she asks for an interdict to restrain him from alienating or mortgaging the land pending such action. If such an interdict could in any way injure other creditors the Court might hesitate to assist the plaintiff but it is not alleged that they would be injured. Bearing in mind that a husband is in a certain sense the guardian of a wife, that there is reason to believe that the alienation will take place if not interdicted, and that the interdict will injure no one, the Court will continue the interdict for a period of three months.*

[Applicant's Attorneys, Messrs. Findlay & Tait; Respondent's Attorney, C. C. Silberbauer.]

* *Ex parte* VALLANCE. } 1895.
 } Aug. 5th.

Minor's property—Mortgage.

Under special circumstances, and where it was clearly for the benefit of minors, the Court authorised their father, who had bought landed property and had it transferred to himself in trust for his minor children, to mortgage the property for the purpose of raising money to build a cottage to be occupied by himself and his children.

Petition of William Vallance of Oudtshoorn.

The petitioner in 1889 purchased the remaining extent of an erf in Oudtshoorn, for which he paid £55, and which he caused to be transferred to himself in trust for his minor children.

* Afterwards on the 30th August the petitioner instituted consolidated actions against her husband for a refund of the advances and for divorce. Both actions were undefended. In the first the Court gave judgment in favour of the plaintiff for the amount of the advances with costs. In the second the adultery with the plaintiff's daughter was clearly proved but judgment was deferred pending the result of the defendant's trial on the criminal charge of incest.

REP.

Thereafter he purchased another portion of the erf, for which he paid £12 10s., and which he likewise had transferred to himself in trust for his minor children.

The petitioner thereafter erected buildings and effected other permanent improvements upon the property which have greatly enhanced its value. The Divisional Council valuation, which in 1889 was £78, is now £300.

The petitioner alleged that he was a poor man and that both he and his wife had lost their employment.

That the buildings erected on the erf bring in a rental of £3 16s. per month and that he was desirous of erecting a cottage on the property as a residence for himself and his family, and that he required £150 to defray the expenses of the building.

He alleged that by building such a cottage he would effect an annual saving of £27, as he would have to pay at least £3 a month for house rent, whereas the interest on the loan would be only £9 per annum, and this would assist the petitioner to maintain and educate his children, the eldest of whom was only eleven years of age, and that the cottage would always, if let, bring in a rental of £3 per month.

The prayer was for an order authorising the petitioner to raise a loan on the property of £150 towards defraying the cost of erecting the cottage.

A sworn appraiser certified that the improvements effected on the erf amounted in value to £250.

The matter was referred to the Master and he reported as follows: As it appears from the sworn appraiser's certificate that the petitioner has made permanent improvements of the value of £250 to the minors' property, and as the money proposed to be borrowed will be spent in erecting a building which will also belong to the minors, I think the application may be granted on condition that the petitioner binds himself for the due payment of the interest on the bond.

Mr. Tredgold moved.

The Court granted the application in terms of the Master's report.

[Petitioner's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

IN THE MATTER OF THE BRITSTOWN DUTCH REFORMED CHURCH.

Mr. Watermeyer moved to make absolute the rule *nisi* for the attachment and sale in execu-

* See *Ex parte Von Post* (3 Sheil, 227).

tion for the payment of rates due thereon of certain three plots of land, registered in the names of J. Joubert, G. Pretorius, and P. Haarhoff, in Britstown.

The application was granted.

IN THE MATTER OF THE MINOR MICHEL J. FOURIE.

Mr. Tredgold applied for authority to the tutor dative of the said minor to raise a sum of money on mortgage of certain two sub-divisional parts of the farm Armoed, in the district of Oudtshoorn, to enable transfer of his share therein to be passed to the minor.

The order was granted.

IN THE ESTATE OF THE LATE WILLIAM THOMAS.

Mr. Tredgold asked for authority to the executors testamentary to raise a sum of money not exceeding £200 on second mortgage of the landed property of the estate, situated in Cape Town, for the purpose of effecting necessary repairs.

The order was granted, subject to the approval of the Master as to the precise amount to be advanced.

THE PETITION OF HUGH LYNCH.

Mr. Benjamin moved for leave to sue *in forma pauperis* in an action against the Colonial Government for the recovery of damages by reason of injuries sustained by petitioner through the negligence of the railway officials in charge of an engine at Port Elizabeth.

Referred.

ASSMAN V. RAUTMAN.

1895.
Aug. 6th.
„ 7th.

Public road—Natural obstruction—Interdict.

A road which had been used by the public for upwards of thirty years was obstructed at one part by a sand hill blown across it.

Held, that those entitled to the use of the road had no right, without the permission of the owner of the land, to make a new track in a different direction and that, if owing to the impossibility of crossing the natural obstruction, they went round the sand hill, they should do so by the least circuitous route coming back to the existing road.

The fact that the owner did not for a number of years object to the new track—which was

made without any expense—being used does not debar him from his right to an interdict against its further use.

This was an action for an interdict and for damages instituted by Christian Fredrik Assman against Heinrich Wilhelm Rautman, both farmers living on the Cape Flats.

The declaration alleged that the plaintiff is the registered owner of the farm Morrisdale, situate upon the Flats in the Cape Division. That in the years 1893 and 1894, and continuously during those years, the defendant by himself and with carts and horses wrongfully and unlawfully committed trespass upon the plaintiff's farm and the land adjoining, of which the plaintiff is the registered proprietor.

The plaintiff annexed to his declaration a tracing of the diagram of his farm showing the particular portions upon which the trespasses were committed in crossing the farm and land.

That the defendant wrongfully and unlawfully removed certain fencing poles, and filled up certain ditches upon the plaintiff's property, and caused other injuries to the farm and land by the trespasses, whereby the plaintiff sustained damages in the sum of £100.

That the plaintiff called upon the defendant to desist from trespassing upon his property, and to pay him the sum of £100, but the defendant refused to do so.

The plaintiff claimed:

(a) A perpetual interdict restraining the defendant from trespassing.

(b) The sum of £100 damages and costs.

The defendant specially pleaded that according to the plaintiff's title deeds the land comprising the property now held by him, and known as Morrisdale, was granted upon condition that all roads and thoroughfares existing on the land at the sale of the grant should remain free and open.

That at the date of the grant a road or thoroughfare existed over the land for the use of the defendant and other members of the public, and a right of way over the land has been exercised of right by the defendant and his predecessors in title and by the public for a period of more than thirty years.

That during the years 1893 and 1894 the defendant did on divers occasions cross the plaintiff's farm, as he had a right to do, by reason of the premises. He so crossed along a beaten track, which was in existence at the date of the grant, or which, with the consent of the plaintiff's predecessors, had been substituted

for one then in existence, and which has been used by the defendant and his predecessors in title for a period far longer than the period of prescription. He denied that he had removed poles and filled up ditches on the plaintiff's land, or that he had trespassed upon the plaintiff's property.

Issue was joined on the replication.

Mr. Searle, Q.C., and Mr. Graham for the plaintiff.

Mr. Rose-Innes, Q.C., and Mr. Molteno for the defendant.

Mr. Petrus Keytel Maskew, Government land surveyor, deposed that a survey of the vicinity had been made under his direction, as shown in the plans produced before the Court.

Cross-examined by Mr. Innes: The roads marked on the plan were all well defined roads, but the road in dispute, not acknowledged on the plan, was also a well-defined track.

Mr. Valentine Scaer, Government land surveyor, deposed that he actually made the survey, and gave formal evidence.

Mr. Chas. Neumann-Thomas, of the Surveyor's Department, produced plans of the survey of 1892.

Mr. Christian F. Assman, the plaintiff, deposed that he was the registered owner of the farm Morrisdale, of which he took transfer in 1891. He purchased it from Mrs. Duhr. He found a road across the property leading to Claremont, as shown in red on the plan. He had seen Rautman using several roads marked in red. He objected, and a meeting was held of the farmers, at which he said he would agree to their using one road 30 feet wide if they would give up using all the other roads. They would not agree to this, and he cut several ditches across the roads. He frequently remonstrated with Rautman on the subject, but he replied that he and others could use any road they liked. Last June he sued a number of the farmers in the Magistrate's Court, including Rautman, but the Magistrate dismissed the case on the ground that he had no jurisdiction. Subsequently they had another meeting, when it was agreed that they should have one road, but when it came to a question of the costs that had been incurred, they would not pay them and a possible amicable arrangement fell through. Since then Rautman and others had made several other roads across the farm, deviating in all directions, and the extent of ground cut up by these roads was now about 200 yards wide. This, of course, injured him greatly. He wanted to graze his cattle and plant a thousand trees, Port Jackson willows, but was prevented from doing so. His son-in-law Larson was living on the

property, and he (witness) lived on the adjoining property with his step-son. He had sustained serious damage. He reckoned about five morgen of his ground had been ruined, and his loss would be £100 at a moderate estimate. The defendant and others made roads wherever they liked. When one track became sandy they made another, destroying the herbage and grass. He had counted thirty-six roads altogether across his farm.

Cross-examined by Mr. Innes: He believed from what he had been told that Rautman and others had a right to use the one old road across his farm. He had been told that if the public used it for thirty years without interruption they established their rights, and he would not deny the right as far as this one oad was concerned.

Mr. Innes said that he appeared only for one man—Rautman—who denied that he had deviated from the road and cut up the farm as described by plaintiff. He would contend that the plaintiff should have got the road fixed by the Divisional Council. Rautman was not responsible for what others might do.

Cross-examination continued: He admitted that the public must have one road, and he left it to the Court whether it should be the old road or the new road. It would be better for him (witness) if they used the new road if they would keep strictly to it. He cut ditches across some of the new roads, and stood with a blunderbuss mounting guard. Rautman came along first, at two o'clock one morning, and he had to turn back; witness showed him the road to Mowbray. Subsequently others came up, and he diverted their course in a similar manner. With regard to his estimate of damages, it was true he gave only £150 for the whole farm, but it was a bargain.

Re-examined: He would be satisfied with the decision of the Court as to which of the two roads, marked on the plan, running from east to west, should be used. Regarding the road running from north to south, he would consent to the road leading to the beach being used.

By the Court: The costs in the Magistrate's Court amounted to £26 17s. 8d., and if the farmers had paid them, he would have allowed them to use the new road.

Mr. Searle read a letter sent by the plaintiff to the defendant, stating that he was willing that the public should use the new road provided that it was strictly kept to, and no divergence made; that he wished to be reasonable in the matter, and suggesting an arrangement regarding the costs incurred. The only reply was that the plaintiff must bear all the costs, including the defendant's.

Mr. Innes said that the defendant won the case before the Magistrate.

The Chief Justice: The plaintiff only failed on a technicality, the Magistrate having no jurisdiction.

John Viljoen Duhr deposed that he was field-cornet of the district, and had lived on the farm Morrisdale and the adjoining property for twenty-nine years—all his lifetime. The defendant and others had caused much damage to the plaintiff's farm by the numberless tracks they had made across it.

Cross-examined: In 1889 the old road was abandoned and the new road opened. Since the proceedings in the Magistrate's Court he had seen Rautman using several roads.

Marthinus Duhr gave similar evidence.

Jacob Larson, son-in-law of the plaintiff, said he now lived on the farm Morrisdale; he took occupation three years ago, and at that time there were only two roads on the farm, one to Claremont and one to Mowbray. All the new roads had since been made by the German immigrant farmers. One of the tracks was now 180 yards wide, and they were cutting up good ground, and creating more and more sand.

By the Court: When he remonstrated with Rautman, he (Rautman) claimed the right to use three roads.

Almams Dempers gave corroborative evidence.

John David Leibbrandt deposed that he owned the farm in 1874, up to which time there was practically only one road across the property.

Jacob John Henry Leibbrandt, son of the last witness, also gave evidence to the effect that the roads complained of were of recent construction.

Frederick Leibbrandt deposed that in 1884 there was only one road across the farm Morrisdale.

This closed the case for the plaintiff.

Hendrik Wilhelm Rautman, the defendant, deposed that he had lived in the vicinity for nine years, occupying a farm close to Morrisdale. When he first settled there and bought his farm the Government ranger showed him the road across Morrisdale, and he had used it from that day to this. At the time he bought the farm Assman told him he need not give him a road unless he liked, but that he would allow him to use the road then used by others. In May of last year Rautman made a ditch across the road, and guarded the road with a gun, and said that the road was closed. He with others, removed the obstructions put up by Assman.

Cross-examined: At the time the meeting was held they could not come to an agreement

about the costs. He, with the others, were willing to pay their own costs, but the plaintiff insisted on their also paying his costs.

Peter Henry Willem Meyer deposed that he used the road across plaintiff's farm without interruption up to May last, when he was turned back.

Louis Botha, examined by Mr. Innes, said that he was now living near the defendant, and previously occupied a farm next to Morrisdale. He put up the fence between the two properties about four years ago, and constructed a gate, so that people could pass through. He had known the road in question for thirteen years. There were marks of two old roads there then, as now, but they were quite overgrown with bush, and could not be driven over in a cart. He first settled on the Flats in 1883, and the road close to the gate was then in use the same as at the present time. There was no other route to follow.

Cross-examined by Mr. Searle: Witness asserted that only the one road was in use by the farmers. He had not seen them use any other. Ox-wagons, however, sometimes wandered off on to the veld.

John Jurgens (an old soldier, who served in the German Artillery during the Franco-German War) deposed that he had been settled on the Flats nine years. He had used the road in question and none other during the whole of that time. Larson gave him permission to use the road.

Cross-examined by Mr. Seale: He denied having stated in the Magistrate's Court that permission had not been given to him to use the road.

Martinus Jacobus Smit, former ranger in the Government employ on the Cape Flats, stated that he was born at Morrisdale, and the road had been in existence as long as he could remember. He pointed it out to the Germans who had given evidence.

G. Adriaans, woodcutter, deposed that he had known the road where the ditches were cut for more than thirty years and that was the only road he had ever used. He had never been prevented from using the road. The upper road had existed since he could remember, but was never used.

Philip Adriaans, woodcutter, of Klipfontein, gave similar evidence.

Wm. Kerby Brunett, senior forester, stationed on the Wynberg Flats, said that he had known the road in question for more than five years. There was no other practicable route.

Cross-examined by Mr. Searle: There were two old tracks still to be seen, but he had never seen anybody use them. The old road was now covered by a sand hill and could not be used.

This closed the evidence for the defendant.

Mr. Innes, Q.C., having been heard for the defendant, judgment was given for the plaintiff.

De Villiers, C.J.: The plaintiff in this case, the owner of the farm "Morrisdale," complains of a trespass committed by the defendant in driving over his land, closing up ditches made by him, and removing certain poles planted by him. The defence is that the alleged trespass consisted in the defendant's using a road to which he had acquired a right by prescription and that the closing of the ditches and removing of the poles were necessary acts to enable him to have the proper use of the road. The evidence of prescriptive user sufficiently establishes the fact that until about eight years ago the public had for thirty years and upwards used the road, marked in black on the diagram attached to the declaration, crossing the farm from east to west. If the defendant had only used that road there would have been no trespass. The presumption of immemorial user until eight years ago has not been rebutted by the fact that another track has been opened up of late. But the defendant now insists upon his right to the use of the new track on the ground that the plaintiff has given him leave to change the old for the new track and that the change was necessitated by an obstruction to the old track caused by sand hills blown across it. As to the alleged permission to use the new track the evidence is quite insufficient. When first the new track was used the plaintiff raised no objection. If the defendant had incurred any expense in making a new road, there would have been some justification for the view that the plaintiff's silence, whilst a new construction is going on, is equivalent to a consent. But there was no construction of a road at all. The defendant simply drove in a different direction over the farm, and thus made a new track which he calls a road. The plaintiff might have borne with that, but when the defendant and others widened the track by driving at random on both sides of it, the former was justified in saying to them that if this was to be the result of his good nature they must return to the old road. It is said that the restoration of the old road would be expensive, but there is no evidence to show that it would cost more now than it would have cost at the time when the old road was abandoned. It was really abandoned because of the bad condition into which it had been allowed to fall. The fact that a sand hill had been blown across the road was not a sufficient excuse for its total abandonment. If it was impossible to cross the sand hill defendant would have been jus-

tified in going round the sand hill, but he could not take a more circuitous road than was necessary. Instead of going round to the old road he made a new road in a different direction and this undoubtedly was a trespass. There was a time when land on the Cape Flats was considered almost valueless and no objection was raised to tracks being made at random over private property. As cultivation has improved and increased, especially through the industry of the German settlers, the owners of land have become more strict in the assertion of their rights, and they are entitled to the protection of the Court against any further encroachment on those rights. The plaintiff is now willing to allow the defendant to use the new road, but on condition that it shall be in a direct line from east to west without any deviations. The Court will therefore grant an interdict with costs, restraining the defendant from using any other road than the one marked in red which is not to exceed thirty feet in width,

Mr. Justice Upington concurred.

On the application of Mr. Searle, plaintiff's expenses were allowed, but cost of survey refused.

[Plaintiff's Attorneys, Messrs. J. & H. Reid & Nephew; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SUPREME COURT.

[Before Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

FRANS JACOBUS STOFBERG V. { 1895.
MICHAEL THOMAS KING. { Aug. 8th.

Mr. Graham moved.—Judgment was given for the plaintiff for costs.

FRANS JACOBUS STOFBERG V. M. T. KING AND
DROOMER.

Mr. Graham moved.—Provisional sentence was granted for £14 on an I O U with costs.

ILLIQUID ROLL.

IDEN GARLICK V. LEONARD MOMMEN, SEN.

Mr. Buchanan moved for judgment for £181 15s. 2d., being the balance of account for goods sold.

Judgment was granted with costs.

ADMISSION.

Ex parte CLEGHORN.

Mr. Close moved for the admission of Jas. Bruce Cleghorn as an attorney and notary of the Supreme Court.

The application was granted, and the applicant duly sworn.

REHABILITATION.

Mr. Tredgold applied for the rehabilitation of George Curtis.

The application was granted.

REGINA V. SIGCAU. { 1895.
{ Aug. 8th.

Appeal to Privy Council—Criminal case—
Sections 50 and 51 of Charter of Justice.

The Governor having by Proclamation condemned and sentenced a Native Chief under the Pondoland Annexation Act the Court ordered his release on the ground that the Proclamation had not the force of law, whereupon the Attorney-General applied for leave to appeal.

Held, that the proceeding was not a civil suit in terms of the 50th section of the Charter of Justice and that the Court had no power to grant leave to appeal.

The Attorney-General (Mr. Schreiner, Q.C.) (with him Mr. Giddy) presented the following petition for leave to appeal to the Privy Council from the judgment of the Court discharging Sigcau on the 30th July last (Vide ante p. 268).

(1) That your petitioners are the Prime Minister (the Right Hon. Cecil John Rhodes) and the Attorney-General (Hon. W. P. Schreiner, Q.C.), and were, with the Resident Magistrate of Kokstad, respondents in a certain civil suit or action heard on motion in this Honourable Court on Tuesday, the 30th day of July, 1895, in which one Sigcau was applicant; (2) that the order of this Honourable Court was to the following effect,

to wit. Upon hearing Mr. Juta, Q.C. (with him Mr. Benjamin), of counsel for applicant, and Mr. Attorney-General Schreiner, Q.C. (with him Mr. Giddy), for the Colonial Government, and upon reading applicant's petition, praying this Court to inquire by what authority he is detained in custody, and in default of lawful authority to order his immediate liberation and discharge, "it is ordered that the said applicant be forthwith discharged from custody"; (3) that the matter at issue in the said civil suit or action was the discharge from the custody of the said Sigcau, and the said Sigcau has been discharged in accordance with the said order; (4) that the discharge of the said Sigcau and his being at large have involved or will directly or indirectly involve the expenditure of many thousands of pounds in and about the maintenance of a larger force of Cape Mounted Riflemen than would otherwise be required in the territory of Griqualand East (including Eastern Pondoland) and in the territory of Tembuland (including Western Pondoland) for the preservation of peace, order, and good government, and for securing the effective administration of law, inasmuch as by the maintenance thereof of the said force the expenditure upon that force and upon the Cape Police must be greatly increased; (5) that your petitioners in their said capacities are aggrieved by the said order, and desire to appeal from the said order of this Honourable Court to Her Majesty in her Privy Council. Wherefore your petitioners pray that your lordships may be pleased to allow them to appeal from the said order to Her Majesty in her Privy Council.—Dated at Cape Town the 8th day of August, 1895.—(Signed) C. J. Rhodes, W. P. Schreiner.

Mr. Juta, Q.C. (with him Mr. Benjamin), opposed the application.

Mr. Schreiner, Q.C. A.G.: The application raises the question whether, under the 50th section of the Charter of Justice, the Court has power to grant leave to appeal in a case like the present. Under the 51st section application could be made direct to the Privy Council for leave to appeal, but the applicants nevertheless come to the Supreme Court for a ruling on the important point involved. It is submitted that the proceedings against Sigcau were civil and not criminal. There was no criminal charge. Sigcau was merely detained under the Proclamation. To say that the suit was neither civil nor criminal would be more correct than to say it was criminal. Of course, it is entirely in the hands of the Court to determine whether the 50th section of the Charter gives the power to grant leave to appeal, or whether the Court would refer the applicants to section 51, and

the ruling of the Court on this important point is desired. The previous application could not be regarded as a criminal case, and if it was a civil case my learned friend would probably agree that it was worth more than £500 to Sigcau in its issues. It was a case of somewhat peculiar character, somewhat similar to that which would apply in the case of prisoners of war.

The Chief Justice: There are cases in which a person might be put in prison and yet not be a criminal. A person imprisoned for debt, making an application for release; that would be a civil case.

Mr. Schreiner: No criminal charge was formally laid against Sigcau. It was contemplated to remove him from surroundings which were dangerous to peace, order, and good government.

Mr. Justice Upington: The Proclamation says, "he is dangerous to public safety and good order in that country, and likely to lead to disturbance of the peace." If that is not a criminal charge, I do not know what is.

Mr. Schreiner: I am unaware of anything in connection with the proceedings which disclosed a criminal charge. As a matter of fact, the result of the order for the release of Sigcau has been that the Government has had to maintain a large force of police in the territory, which otherwise would have been withdrawn.

The Chief Justice (to Mr. Juta): Do you oppose?

Mr. Juta: Yes, I strongly oppose. The matter is not a civil suit or action within the meaning of the 50th section of the Charter. The very essence of the case is that no costs were given against the Government, showing that the proceedings were criminal and not civil.

The Chief Justice: The applicants have the power of going direct to the Privy Council for leave to appeal under section 51 of the Charter.

Mr. Juta: That is what they should do.

Mr. Justice Upington: There was a case in which a petition was presented to the Privy Council, on a conviction under the Illicit Diamond Act, but the Privy Council refused to entertain it.

Mr. Juta: The proper course for the applicants would be to go direct to the Privy Council, and I take it that the present application is a mere form of courtesy to the Court more than anything else.

Mr. Schreiner: My learned friend is in error as to the costs. As a matter of fact the records show that costs were claimed against the Government, but it was true the question was not actually referred to in the proceedings

before the Court. We do not come to the Supreme Court as a mere form of courtesy but because we wish for a decision under the 50th section of the Charter.

The application was refused with costs.

De Villiers, C.J.: The Court is always desirous to give every facility to suitors for appealing against its judgments but it can only do so in accordance with the provisions of the law. Leave to appeal to the Privy Council can only be granted "in civil suits or actions" in which the sum or matter at issue exceeds the sum of £500. If Sigcau's application for release from imprisonment can be classed among civil suits or actions the fact that there is no proof of the value to him of his personal liberty would not stand in the way of the present application. He had been sentenced to practical exile from his own country for the rest of his life and no evidence would be required to show that such a sentence involves a money value of more than £500. It certainly was unnecessary for the applicants to import into their petition the statement that the discharge of Sigcau will involve the expenditure of many thousands of pounds in the maintenance of a larger force of riflemen than would otherwise be required for the maintenance of peace. This is a matter of opinion regarding which it is not necessary to add anything to the remarks made by the Court at the time of giving the judgment sought to be appealed against. The only question is whether that judgment was given in a civil case. If Sigcau, after having been tried and sentenced by a Court of law, had applied to this Court for his release on the ground of some irregularity in the proceedings such application would undoubtedly have been a criminal and not a civil suit. The fact that he was tried and sentenced by the Governor's Proclamation without the intervention of a Court of law does not alter the nature of the legal proceedings taken by him for relief. It is satisfactory to the Court to know that its inability to give the leave asked for will not debar the applicants from obtaining such leave from the Privy Council itself. The power of admitting the appeal of any aggrieved person in any suit, civil or criminal, is expressly reserved to the Privy Council by the 51st section of the Charter, but the application to this Court must be refused with costs.

Mr. Justice Uplington: I am strongly of the same opinion.

[Attorneys for the Government, Messrs. J. & H. Reid & Nephew; Attorneys for the Respondent, Messrs. Van Zyl & Buissinné.]

GENERAL MOTIONS.

1. STRYDOM'S TRUSTEE V. CORNELIS J. STRYDOM.

2. STRYDOM'S TRUSTEE V. PETRUS A. G. STRYDOM.

Mr. Innes, Q.C. (with him Mr. Juta, Q.C.), applied for orders requiring the respondents to pay the costs of the applications to this Court of the 2nd April last, whereby applicant was restrained from selling certain assets of Strydom's insolvent estate during a period of three months to allow respondents to institute an action in respect thereof, and which they have failed to do.

The order was granted.

LIND V. GIBBS AND COOPER. { 1895.
Aug. 8th.

Interdict—Trespass.

Interdict granted, pending the institution of an action, restraining the making of bricks and other similar acts of trespass on the remaining extent of the farms "Hartebeest River" and "Grobbelaar's River," commonly called the Commouage of Oudtshoorn.

This was an application on notice to the respondents calling upon them to show cause why they should not be restrained from removing clay or soil, digging holes, making and removing bricks, excavating or otherwise trespassing upon and damaging the property in the division of Oudtshoorn being the remaining extents of the farms "Hartebeest River" and "Grobbelaar's River" or any part thereof, of which the applicant is one of the joint proprietors, pending an action about to be instituted against them.

The applicant alleged in his affidavit that (a) he, (b) the estate of Cornelius Petrus Rademeyer (c) the estate of Johan Coenraad Schoeman, and (d) Gideon Johannes Hendricus Scheepers are the co-proprietors in undefined shares of the remaining extent of the farms in question.

He annexed his deed of transfer showing that $\frac{7}{13}$ parts in the remaining extent of the farms stand registered in his name.

That on the 12th July, upon information received he proceeded to the outskirts of the township of Oudtshoorn and found two coloured men busy making bricks, and upon inspection of the locality found that a deep excavation had been made from which a large quantity of ground had been removed for the preparation of clay, then lying on the surface, and that a

patch of ground had been cleared of its existing bush and vegetation for a floor, and for the stacking of bricks, of which there were about 18,000 ready for burning.

That the locality where the brick-making operations were being carried on, is comprised within the area of the remaining extents of the farms in question.

He referred the Court to his title deeds against which no servitude is registered for the exercise of such acts on the part of any person whatsoever.

That upon further inquiry applicant learnt from the persons making the bricks that they did so under contract and at the instance of the respondent Gibbs.

That thereupon they were informed by applicant of their wrongdoing and trespass, and forthwith warned to desist on pain of arrest.

That on the morning of the same day (12th July) the respondent, who had been informed of what had transpired, came to applicant's office and informed him that he had verbal authority from the Town Clerk to make bricks, and that he intended giving brick making a trial with the object of making it an industry on a large scale.

That applicant informed the respondent that he was trespassing and committing wrongful acts on the property of applicant and his co-proprietors, and explained the position he took up in the matter, and informed him that the Town Clerk had no right to confer powers on persons to trespass on private property and cause damage and injury to applicant and his co-proprietors.

That respondent then promised applicant that he would suspend any further operations pending a meeting to be convened by the proprietors for the purpose of discussing and arranging matters.

That a notice was then sent to the respondent, which was ignored and the brick making continued.

In reply to the above the respondent alleged that the applicant had greatly exaggerated the true facts.

He further alleged that the remaining extent of the farms was now the commonage of Oudtshoorn and vested in the Municipality.

He admitted that he had made bricks on the land but said that he had done so with the consent of the Town Clerk, and that though the applicant was acquainted with the fact that the bricks were being made on his (respondent's) account he (applicant) caused the two men who were making the bricks to be apprehended and lodged in gaol.

B 2

The Mayor of Oudtshoorn filed an affidavit in which he alleged *inter alia* that in 1847 the then proprietors of the farms Hartebeest River and Grobbelaar's River laid out and caused to be surveyed certain erven with the intention of forming a village (now the village of Oudtshoorn). Some of these erven formed part of the farm "Hartebeest River," others part of "Grobbelaar's River."

Thereafter in 1847 these erven were offered for sale by public competition.

The erven were sold subject to certain printed conditions of sale, which are duly registered in the office of the Registrar of Deeds in Cape Town, against the transfers of the original erfholders.

That he had been informed that the original purchasers were given to understand by the then proprietors who sold the erven that the remainder of the farms Hartebeest River and Grobbelaar's River vested in them as commonage save and except certain rights which the original proprietors retained to themselves by clause 9 of the conditions of sale.

That in the exercise of these rights the erfholders not only depastured their stock on the commonage in terms of the conditions of sale but quarried stones, made bricks, and removed clay and sand from the commonage for building purposes and wood for household purposes.

That all these rights were exercised by the erfholders free from interference by the original proprietors until the year 1863. In that year the erfholders petitioned to have the village declared a municipality, to which request the Government acceded.

The erfholders then made regulations for the better control of the commonage and for other purposes, thereby making over their right in trust to the Commissioners elected by them.

That the original municipal regulations were from time to time amended and repealed and others framed in their place.

In the year 1887 the Municipality was brought under the Municipal Act of 1882.

The boundaries of the commonage (that is, the remaining extent of the farms Hartebeest River and Grobbelaar's River) were defined in 1863 as per Proclamation.

When the Municipality came under the Municipal Act of 1882 the former regulations were repealed, the boundaries were redefined and bye-laws published as per Proclamation. (Extracts from the two Proclamations were attached.)

The deponent alleged that the applicant, who is an attorney of the Supreme Court, was elected a Commissioner on more than one

occasion, that thereafter he withdrew as Commissioner and accepted the appointment as legal adviser to the Council.

That in that capacity he acted for a number of years and up to as late as 20th July.

That whilst acting as the legal adviser of the Council the applicant purchased with Scheepers, jun., a portion of the remaining extent as a joint speculation.

The deponent said that it was the duty of the applicant whilst acting as the Council's legal adviser, had he considered it to the interests of the Council to purchase the said rights, to have advised them thereof, instead of purchasing himself and allowing others to purchase, and that with the intention of speculation.

That the applicant after he had received transfer and whilst still acting as the legal adviser of the Council commenced to harass them and the villagers by imprisoning men who were making bricks on the commonage with the consent of the Council.

The deponent finally alleged that the Council claimed to have sole control of the commonage of the village of Oudtshoorn :

(a) By the servitude granted by the original proprietors in favour of the erfholders.

(b) By virtue of section 159 of the Municipal Act of 1882.

(c) By prescription.

The applicant in his replying affidavit denied that the *dominium* in the remaining extent of the farms was vested in the Council.

He alleged that the rights exercised by the erfholders (except the grazing rights) were merely precarious, and he referred the Court to regulations 1, 3, 23 and 76.

He alleged that his purchase of a portion of the remaining extent was perfectly open and *bona fide*, and that after the purchase his services were retained by the Council and were only dispensed with after he took steps, during the month of July, 1895, to have his rights respected by causing the arrest of two boys, who after being duly warned of their illegal acts refused to leave the ground they were trespassing on and damaging.

He repudiated in strong terms the motives imputed to him in the Mayor's affidavit.

He stated that he was prepared to produce proof in support of the fact that in and about the neighbourhood where the respondents were carrying on brick-making operations many available sites for building allotments exist, and that he had received several applications from time to time for the disposal of such building etc.

He lastly said that he had frequently, openly, and publicly stated to individual members of the Town Council that the property of the original proprietors should be purchased for the benefit of the town.

Section 9 of the original conditions of sale was in the following terms :

The public pasturage of the cattle of the village shall embrace all the land of the places Harto-beest River and Grobbelaar's River, saving the rights which the owners of the grants of such places reserve to themselves in respect of such portions as should hereafter be devoted for the purposes of building erven, or for other useful purposes for the public benefit.

Sections 3, 23, and 76 of the Municipal Regulations were as follows :

3. *Any person making bricks upon any part of the pasture or unsold land, without the consent of the Commissioners of the Municipality and of the proprietors (above named), shall forfeit or pay the sum of £5, and the proprietors above named shall have the right to sue such person in any competent Court for any damages which they may sustain thereby.*

23. *The Commissioners shall, with the consent of the proprietors aforesaid, fix and set apart in some suitable or convenient place or places burial grounds for the interment of the dead, and any person who shall be found disturbing any grave, breaking down or defacing any tomb, monument or other erection therein shall be liable to a fine of £10.*

76. *No quarry shall be opened or bricks made upon any erf or ground which the proprietors have set apart or intend to sell for building allotments.*

Mr. Rose-Innes, Q.C. (with him Mr. Searle, Q.C.), for the applicant : The applicant is the registered owner of an undivided share of the farm. He is therefore entitled in the absence of special limitation to an interdict restraining excavation against his will. A person so excavating must prove his right. In 1847 Oudtshoorn was established. Certain erven were laid out and sold subject to the conditions of sale annexed to the title deeds of the erven. See conditions 9, 10 and 11. Not a word is said in the conditions giving the inhabitants of Oudtshoorn a right to dig or make bricks on the remaining extent.

Before the Municipality was established each erfholder was entitled to graze certain stock ; and could sue any person who by grazing too much or by enclosing ground interfered with his grazing servitude. But the owners of the remaining extent could always sell *bona fide* for building lots and could make any use of the land which did not interfere with the

grazing. The Municipality was established in 1863 but its establishment did not enable the Commissioners to interfere with the servitude of the erfholders, nor did it take away the right of individual erfholders to sue; see *Edmeades v. Schepers* (1 Juta, 384) and *Edmeades v. Reits* (1880, not reported) and *a fortiori* it did not give the Municipality the ownership of the remaining extent or give them greater rights than erfholders had. Would any erfholder have a right to dig clay for bricks? Clearly not, where then do the Municipality obtain their right to sanction this trespass? It is submitted that the applicant is entitled to an interdict.

Mr. Juta, Q.C., for the respondents: The applicant has shown no grounds for obtaining an interdict. He has not sustained irreparable damage. For forty-eight years the acts now complained of have been exercised and the period of prescription has run in favour of the inhabitants of Oudtshoorn. He cited *Municipality of Swellendam v. Surveyor-General* (3 Mees., 578).

Mr. Rose-Innes, Q.C., in reply,

The application was granted.

The Chief Justice said: I confess that in this case I do not altogether approve of the action of the applicant, who began proceedings by summarily arresting the two men who, by the directions of others, were busy making bricks upon the land which is now in question. It is purely a civil question between the parties, and I do not think it was the proper thing on the part of the applicant to begin these proceedings by means of criminal arrest. Also, it certainly does not look well that he was a Commissioner at one time, and that he was the legal adviser of the Municipality at the time when the new regulations were drafted. In those new regulations there is no recognition of the right of the owners to prevent the digging of clay on the property, but there is a full recognition of the right of the Commissioners to grant licences for the digging of clay on the property. But these considerations ought not to affect the purely legal question which the Court has now to decide. It is not alleged that there is anything in the nature of fraud on the applicant's part to justify his being debarred from obtaining relief if he is on legal grounds entitled to such relief. The respondents, if they have any right at all to the digging of clay upon the property, must have acquired that right by prescription; there is no other way by which it could have been acquired, and if there had been evidence in this case that, uninterruptedly from 1847, without asking the leave of the proprietors, the erfholders had exercised the right of digging clay on this property, I

should not have hesitated to hold that a right by prescription had been acquired. But unfortunately for the respondents, in the Municipal Regulations framed in the year 1863 there is a clear recognition of the rights of the proprietors; their right to grant or withhold their licences for the making of bricks upon the land. The third regulation says that "any person making bricks without the consent of the Municipality and of the proprietors shall forfeit or pay the sum of £5, and the proprietors shall have the right to sue such person for damages." Now nothing could be a clearer recognition of the right of the proprietors to prevent the digging of clay, or to show that the right, if exercised at all, was exercised by the licence of the proprietors. Then I find also that the 76th section of the regulations provides "that no quarry shall be opened or bricks made upon any erf or ground which the proprietors have set apart or intend to sell for building purposes." Now the Court has already decided that the right to land for building allotments has been reserved by the proprietors, and in the present case it is alleged that the land upon which the quarrying is now taking place is land which the proprietors intend to sell for building purposes, so that, independent of the 3rd regulation, the 76th regulation would be sufficient. And it is clearly understood that in a servitude by prescription there must be adverse user for the full period of the prescription; while in the present case it is clear that the legal licence of the proprietors was a necessary ingredient in the exercise of this power. It is quite true that from 1847 to 1863 there were no regulations in force, but that was not the full period of prescription. In 1863 the licences of the proprietors were authorised, and then in 1887 these licences were no longer required, but only nine years not thirty have elapsed since 1887. Under these circumstances, it is a question whether we ought to encourage these people to go on with further litigation by refusing the application. On the whole, it is better not to encourage further litigation with these regulations standing as they are. There may be plenty of evidence to show that this right was exercised, but all that evidence would be of very little value in the face of these regulations. On the whole, it is the better course to grant the interdict at once. But the Court, in granting the interdict, gives full leave to the respondents to bring an action to set it aside if they wish. My only doubt now is as to the question of costs.

The Court having heard argument of the question of costs,

The Chief Justice said : My sole object was to prevent further unnecessary litigation, but seeing that the applicant himself asks for an interdict only pending an action to be instituted against the respondents, I do not think the Court can give him more than he asks for, and as he has to bring an action, the question of costs had better abide the result. The interdict granted will be pending an action to be instituted by the applicant against the respondents and the Municipality, costs to stand over pending the result.

Mr. Justice Upington concurred.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondents' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

THE ALBERT DISTRICT GOLD-MINING COMPANY.

Mr. Searle, Q.C., applied for an order in terms of the fourth and final report of the official liquidator.

The order was granted as prayed, the sum of £50 to be paid to the official liquidator for his services.

SCOTT V. GILLET. } 1895.
Aug. 9th.

Conditions of sale—Water-rate—Liability.

G. in anticipation of the discovery of gold in the Prince Albert district, laid out a township on his farm and advertised and offered erven for sale.

The erven were sold subject to conditions of sale, the 12th condition being in the following terms. . . . Water will be laid on to the Market-square for the domestic use of erfholders on condition of a payment of 5s. per month to the seller, his order, or representative by the owner or occupier of each erf.

S. bought three erven and signed the conditions of sale.

G. laid on water to the intended site of the Marketsquare, but it was not used, as the expectations with regard to the discovery of gold were not realised, and in consequence no buildings were erected on the erven.

Held, on appeal, that S. was liable under the 12th condition of sale to pay the water rate.

This was an appeal from a decision of the Resident Magistrate of Cape Town in an action in which the present re-

spondent sued the appellant (defendant in the Court below) for the sum of £24 15s., reduced to £20 to bring the claim within the Magistrate's jurisdiction, alleged to be due under certain written conditions of sale under which the defendant bound himself on or about the 1st September, 1891, to pay the plaintiff the sum of 15s. per month for water, to be supplied by plaintiff to defendant from month to month on the Market-square of Gilletville, in the division of Prince Albert, and which water, the summons alleged, had been duly supplied by plaintiff as agreed.

The defendant denied the debt, and pleaded the general issue.

The facts are briefly these: In September, 1891, the plaintiff owned the farm Kleinkruidfontein, in the Gouph. In anticipation of the discovery of gold in the division of Prince Albert he laid out a township on the farm, which he called Gilletville, and sold by public auction certain erven. The defendant purchased three erven, for which he paid £100, but at first refused to sign the conditions of sale on the ground that he would have to pay £9 a year for the water rates, but he did eventually sign the conditions, at the same time remarking to the plaintiff, apparently in jest, that he would have to take the value out in clothes. The plaintiff laid on water to a pump in the Market-square, as some of the purchasers refused to pay the purchase price of the erven until the water had been laid on. The water, however, was never used, as no buildings were erected on the erven, gold not having been discovered in payable quantities in the district. The 12th, 13th, and 20th conditions of sale were as follows:

12. Water will be laid on on the Market-square for the domestic use of erfholders on condition of a payment of 5s. per month to the seller, his order, or representative by the owner or occupier of each erf.

13. The owner of each erf will have the right of grazing ten sheep or goats, and two head of cattle on the grazing ground at a payment of 1s. for large and 1d. for small per head on the first day of each month to the seller or his order.

20. The seller is not responsible for beacons, statements at the sale, or other disappointments regarding water, and the ground hereby sold shall be subject to all securities, incumbrances, and other responsibilities attached to the ground and to this sale, Municipal and other regulations, &c.

The advertisement, which was published before the sale, supplied the following information: Each standholder on the above township will have the right of 100 gallons of water per

diem, or more if required. If so desired the above supply will be delivered on the stands by means of pipes at a charge of 5s. per month.

The Magistrate gave judgment for the plaintiff for the amount claimed with costs, and from his judgment the present appeal was brought.

Mr. Searle, Q.C., in support of the appeal: The conclusion arrived at by the Magistrate was an absurd one. There was no mutuality between the contracting parties and it could never have been intended that this water rate should be payable for ever. A reasonable construction must be put upon the conditions of sale and as the 12th condition is ambiguous reference must be made to the advertisement to explain the ambiguity. See *Stellenbosch Municipality v. Lindenberg* (3 Searle, 345).

The Chief Justice: Clause 20 of the conditions of sale may modify clause 12, but there is no such latent ambiguity in the latter clause as would justify the Court in construing it in the light of the advertisement. It is not alleged that there was fraud in the transaction.

Mr. Searle: It is submitted that the intention of the parties was that the rate should only be payable by those erfholders who had the water laid on to their erven.

It is absurd to suppose that it was intended that Gillet was to enjoy an annuity for leading on to the imaginary Market-square water which was never used.

Mr. Rose-Innes, Q.C.: The case depends upon the construction of the conditions of sale and especially of section 12.

If water was only to be paid for when used as contended for by the appellant, clause 12 would have said so. A clear distinction is drawn between clause 12 and clause 13. Under the former clause the rate is payable in any event, whereas under the latter the grazing fee is only payable if cattle are grazed.

Scott clearly understood the contract into which he was entering: his reference to the plaintiff's taking the amount of the rate in clothes is sufficient to show that.

Mr. Searle replied.

The Court dismissed the appeal.

The Chief Justice said: The conditions upon which the erven were sold were duly signed by the defendant, and we must presume that he knew what the conditions were before he signed; in fact, he said before the Resident Magistrate that he did know what the conditions were before he signed them. These conditions therefore constitute the only contract between the parties, and if they are reasonably clear the Court cannot refer to the previous advertisement for the purpose of construing them.

There must be some latent ambiguity in the conditions for the Court to refer to the previous advertisement for the purpose of explaining them. The 12th condition provides that water will be laid on on the Market-square for domestic use, the terms being the payment of 5s. per month to the seller or his representative by the owner or occupier of each erf. Under this condition the proprietor is bound to lay on the water, sufficient water for the domestic use of the erfholders. It is quite true that the 20th section provides that the seller is not responsible for disappointments regarding the water, but this can be construed to mean only such disappointments as may arise out of a want of water not occasioned by the negligence of the proprietor. Were the proprietor wilfully neglectful, I think the purchasers would have had an action for damages against him if he had not complied with his promise under the 12th section to lay the water on to the Market-square. Mr. Searle contends that the 5s. per month is to be paid only by those who actually used the water. If that had been intended then I think a provision like that in the 13th condition would have been inserted in the clause, stating that the amount was only to be paid for the actual use of the water, but these are not the terms of the 12th condition. The only thing that could possibly be said on behalf of the defendant is that possibly the parties intended that the terms of payment of 5s. per month were to apply to the case where the water was actually used, and that the words "for the domestic use of erfholders" are subject to that limitation, but in my opinion these words are merely descriptive. The proprietor is bound to lay on the water; then follow the descriptive words "for the domestic use of the erfholders," merely to show for what purpose the water is to be laid on when the condition of payment of 5s. per month applies, and therefore if the plaintiff proves that he has laid on the water on the Market-square, and that there is sufficient for the domestic use of erfholders, in my opinion the payment of 5s. per month becomes due. It may be a case of hardship on the purchasers, but this contract has been entered into by them, and in consideration of that contract the plaintiff has gone to the expense of laying on the water to the Market-square. In my opinion the Magistrate's decision was right, and the appeal must be dismissed with costs.

Mr. Justice Upington concurred.

[Appellant's Attorneys, Messrs. Van Zyl & Buissinné; Respondents' Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

BOTHA'S TRUSTEE V. GRAY. } 1895.
 } Aug. 9th.
 Undue preference — Insolvent Ordinance,
 section 84—Act 38 of 1884, section 8.

Pledge of cattle declared an undue preference where the transaction took place three months before sequestration, the pledgor being at the time hopelessly insolvent.

This was an appeal from a judgment of the Resident Magistrate of Elliot in an action in which the present appellant, plaintiff in the Court below, sued the defendant to have a certain pledge of cattle set aside as an undue preference under section 84 of Ordinance 6 of 1843.

The summons alleged that Botha's estate was sequestrated on March 4, 1895.

That in December, 1894, Botha at the time contemplating the sequestration of his estate as insolvent, and intending to prefer the defendant before his other creditors, pledged to him the following head of cattle: three heifers, one cow, one calf, one bull, and two oxen, together with three horses, as security for the due payment of a certain promissory note for the sum of £38 15s., dated 28th December, 1894.

That the pledge was in terms of the 84th section of Ordinance 6 of 1843 an undue preference.

The plaintiff prayed:

(a) That the pledge might be declared null and void in terms of section 84 of Ordinance 6 of 1843.

(b) That the defendant might be condemned to deliver to plaintiff the said cattle and horses and pay costs of suit. The defendant pleaded the general issue, and specially that the transaction was protected by section 86 of Ordinance 6 of 1843.

The insolvent was examined and deposed that at the time he gave the pledge (28th December, 1894) the value of his estate was the same as when the schedules were signed, except the animals handed to defendant. (There was a large deficiency in the estate.) He admitted that from the preceding October he had been unable to pay his creditors, and that he knew that unless they gave him time he would have to surrender, and that one or two of them were pressing him.

He alleged, however, that he had no thought of giving an undue preference, because he had no thought of surrendering his estate.

In answer to the Court, the insolvent said that it would have taken him three years to pay all

his debts, that no creditors consented to wait for three years, and that the Divisional Council was pressing him for over £60 in August.

The Magistrate found that there had been no contemplation of sequestration or intention to prefer, and gave judgment in favour of the defendant.

The plaintiff now appealed.

Mr. Juta, Q.C., for the appellant,

Mr. Graham for the respondent.

The Court allowed the appeal.

The Chief Justice said: It appears to me that the Magistrate lost sight of the provisions of the Act of 1884. The 8th section provides that if it be proved that the alienation or pledge was made within six months before the sequestration of the estate, and at a time when the insolvent's liabilities fairly calculated exceeded his assets fairly valued, it shall be presumed that the insolvent at such time contemplated sequestration, unless proof be given to the contrary by the defendant. It therefore lay upon the defendant to prove that there was no contemplation. The Magistrate appears to have treated the case as if it lay upon the plaintiff to prove the contemplation. The plaintiff clearly proved that the pledge was made three months only before the sequestration, and that at that time it was clear that the insolvent was as hopelessly insolvent as he was when the schedules were filed. His liabilities were £390, and the assets were only £82. That was the state of affairs when the pledge was executed. Then a pledge is given of merely one-half of the value of the whole property. The insolvent himself in his evidence says: "From October last I have been unable to pay my creditors, and unless my creditors gave me time, I should have had to surrender." What time were the creditors to give? Three years. It seems a most improbable circumstance that every creditor would consent to give him three years' time to pay his liabilities. According to his own evidence he contemplated insolvency. The Magistrate says that there was no evidence of intention to confer. Upon this point I think he was entirely wrong, because the insolvent himself says: "The defendant himself spoke nicely and said if I gave him something as security he would not lose all, and that some other creditors might take the things." This shows clearly that the pledge was given with a view of preferring the defendant before the other creditors. Under these circumstances, although it is a question of fact, yet as the Magistrate has not given full effect to the Act of 1884, and seeing also that it is rather an inference from facts than the credibility of

witnesses that is in question, I think we should reverse the decision of the Magistrate. The appeal will be allowed with costs, and judgment entered for the plaintiff with costs.

Mr. Justice Upington concurred.

[Appellant's Attorneys, Messrs. J. & H. Reid & Nephew; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

KOCH V. ZACKON. { 1895.
Aug. 9th.

This was an appeal from a judgment of the Resident Magistrate of Van Rhyn's Dorp, in an interpleader suit, in which the present appellant claimed, by right of purchase, a certain ox as his property, which had been attached by the defendant, in execution of a judgment obtained by him against one Koopman, in whose possession the ox was found.

The Resident Magistrate found that the transaction between Koch and Koopman was not a *bona-fide* sale, and declared the ox executable.

The case has been twice before the Court already. On 6th June last the claimant appealed from the Resident Magistrate's judgment, and the case was remitted for further evidence.

Further evidence was heard, and the Resident Magistrate adhered to his previous judgment, and again declared the ox executable.

From this judgment Koch again appealed.

Mr. Graham for the appellant.

Mr. Juta, Q.C., for the respondent.

The Court allowed the appeal.

The Chief Justice said: It appears to me that in this case the Magistrate did not sufficiently bear in mind the very subordinate position occupied by the man Koopman. He was a mere labourer in the service of the Kochs, and that in itself ought to have raised some presumption against his being the actual owner of oxen and the ox in question. Several witnesses were called to prove that there was a sale of the ox by Koopman to Koch, and the particulars of the sale are minutely detailed. Koopman had bought articles from Schreuder, and could not pay for them, whereupon Koch said he would pay if Koopman would hand over or sell the ox to him. Well, there are several witnesses to depose to this transaction, and there is not a single witness to disprove it. It is true that Koopman himself is alleged by the defendant's witnesses to have subsequent to the transaction with Koch offered this ox for sale, although the circumstances under which this was done, if it was done, are not such as are sufficient to cast doubt upon the clear testimony of Koch and his other witnesses, because it is quite possible that the man Koopman might,

if not perfectly sober, talk about offering this ox for sale, and yet that it did not belong to him, but to his master. The only doubt that could arise in the case is as to whether there was delivery. What are the circumstances of delivery? When the ox was bought Koopman pointed it out to Koch, and Koch said: "Very well, you continue to keep this as my ox." If Koopman had not been the servant of Koch at the time it might be said that there was no delivery, but he is the servant, the man who takes charge of the cattle belonging to Koch. Koch said this in the presence of witnesses, who swear that the ox was actually pointed out to Koopman. Koch said to Koopman: "Keep that ox for me; herd it for me." At that moment when the ox was pointed out to Koopman, Koch took possession of it through his servant Koopman. Therefore, there is also proof of delivery. If there was any evidence beyond that of Koopman to cast doubt upon the witnesses who were called on behalf of Koch, I should have hesitated to disturb the judgment of the Magistrate, because upon a question of fact the Court always, if possible, supports the decision of the Magistrate, but in this case, really, in the absence of any evidence of value on behalf of the defendant, I confess that I cannot agree with the Magistrate in casting aside altogether the evidence of the witnesses called on behalf of the claimant. These men were witnesses of respectability, men whose word was to be believed, and it seems hardly creditable that these men would for the sake of the value of the ox come forward and commit perjury, one and all, and not only this, but get the lad Van Zyl to come and swear falsely as to the purchase of this ox. It seems hardly credible that there would have been this conspiracy to commit perjury for the sake of the value of an ox. As far as Zackon is concerned, he has himself to blame for giving credit to a man of this kind. If he chose to give credit to a labourer like Koopman, to a man in that subordinate position, I do not think it is such a hardship on Zackon as it would have been if the debtor had been a person in a different position from the position in which Koopman was. Under all these circumstances, therefore, although reluctantly, I come to the conclusion that the Magistrate's judgment cannot be supported, and that the appeal must be allowed, with costs in this Court and in the Court below. The ox is declared to be the property of Koch. No order will be made as to the costs of the first appeal.

Mr. Justice Upington: I am also of that opinion. I had some doubt when this case was first brought before the Court, and that doubt arose out of the non-production of the receipt,

and I had some suspicion that it was not a *bona-fide* transaction with Schreuder at all. Now I find the reason why the receipt was not produced, and I am satisfied now that there was a *bona-fide* transaction with Schreuder, I believe there was a sale, and I believe there was delivery.

[Appellant's Attorney, W. E. Moore ; Respondent's Attorney, G. Montgomery-Walker.]

SMITH V. MOMBERG AND OTHERS. } 1895.
 } Aug. 12th.
 Restraint on alienation—Consideration—
 Pre-emption—Co-owners—Renunciation.

The co-owners in undivided shares of a farm entered into a contract among themselves that should any of them wish to alienate his share he shall be bound first to offer it to all his co-owners for a certain price.

Held, that the contract was valid and could be enforced.

The fact that the farm was subsequently subdivided or that some of the co-owners did isolated acts inconsistent with the terms of the original contract held to be insufficient to prove a renunciation of their rights of pre-emption by all the co-owners.

This was a special case between Nicholas Johannes Smith, Jurgen Hendrik Smith, Johannes Daniel Smith, and Jan Daniel Smith, plaintiffs, and Abraham Paulus Momberg, Christian Johannes Slabbert, and Louis A. F. Slabbert, defendants.

The first and second named plaintiffs are the sons of the late Nicholas Johannes Smith, sen. The third and fourth named plaintiffs are the sons of the late Jan Daniel Johannes Smith, and the grandsons of the late Nicholas Johannes Smith, sen.

The three defendants are the sons-in-law of the late Nicholas Johannes Smith, sen., being married in community of property with their wives, the daughters of N. J. Smith, sen.

On the 27th August, 1868, N. J. Smith, sen., entered into a written agreement with his sons N. J. Smith, J. H. Smith, and J. D. J. Smith, and with his sons-in-law, A. P. Momberg and L. A. F. Slabbert.

At that date there were two minor children of Smith, sen., namely, a son, G. F. N. Smith, who, on coming of age, accepted the agreement, but has since become insolvent, when his share was purchased jointly by the parties to this action, and

a daughter, S. C. Smith, who, on coming of age, also accepted the contract, and is now married in community to the second-named defendant.

Under the terms of the contract it was agreed that the children of Smith, sen., should accept in full satisfaction of their portions of the balance of their maternal inheritance then due to them, and in satisfaction also of their portions of their paternal inheritance, to which they or their heirs might thereafter become entitled under the law then existing with regard to legitimate portions, a certain farm Uitgeliede Zeekoegat, and in the Zwaart Ruggens, in the division of Graaff-Reinet, under certain conditions and restrictions, to wit, *inter alia*:

(a) That Smith, sen., should, during his life, enjoy the usufruct of one-half of the farm and of the house thereon;

(b) That the two minor children should have the option of accepting or repudiating the contract within twelve months of the date of their coming of age;

(c) That no one of the original parties to the contract should have the right of selling or alienating his portion of the farm until after the lapse of the twelve months in the last subsection referred to;

(d) That if after the lapse of the twelve months any one of the parties bound by the contract was desirous of selling or alienating his share to any outsider, he should offer such share to the rest of the persons bound by the contract for a price bearing the same proportion to £1,500 which the share proposed to be sold or alienated bore to the whole of the farm;

(e) That such offer should first be made collectively to the rest of the persons bound by the contract, and, should any decline, such of them as agreed to accept should have the privilege of purchasing in shares proportional to their respective interests in the farm;

(f) That the heirs of any of the parties bound by the contract should be bound by the same conditions and enjoy the same privileges as the party to the contract to whom they were heirs until such time as all children of Smith, sen., should have died or have ceased to hold a share in the farm.

Smith, sen., has since died, and the parties to this action are now the registered owners of the farm in undivided shares, subject to the conditions of the contract.

The parties on September 25, 1891, went to arbitration to define the shares of the different proprietors, and on the 26th January, 1892, the award was made a rule of Court.

Since the date of the award the defendant L. A. F. Slabbert has sold, but has not yet transferred, his share of the farm to the defendant

Momberg, without complying with the terms of the contract by offering his share to the other parties to the contract for the price therein provided.

The plaintiffs are willing and desirous of acquiring the said share for the said price.

Before the sub-division was made under the award, C. J. Slabbert sold one morgen of the land, which fell to his share, to J. H. Smith, for £100. This price far exceeded the price provided for in the contract of August, 1868, and although Slabbert offered the morgen to all the other proprietors, he never so offered it for the proportionate price provided in the contract, but no objection was raised by the other proprietors to the sale to Smith, in whose share the morgen was included in the sub-division.

C. J. Slabbert offered to the other proprietors to let his share of the farm to them for £75 a year, which is a sum far exceeding the amount provided for in the contract, and upon their refusing to hire, he let the share at that rent (£75) to a person other than one of the proprietors. Slabbert never offered his share at the amount provided for in the contract to the other proprietors, and he let the share to their knowledge and without any objection on their part.

After the sub-division the plaintiff N. Smith let to J. A. Smith, the second plaintiff, about one-half of his share in the farm for two years, at a rental of £30 per annum, with the knowledge or consent of the defendants. The third and fourth plaintiffs are the sons of the late J. D. J. Smith, who was a party to the contract. He was married in community of property, and died in May, 1888, and his widow took transfer into her own name of his share in the farm in satisfaction of her share in the joint estate, and subsequently she transferred the share to her sons, the plaintiffs before mentioned.

(On 7th December, 1891, after the sub-division had taken place, another agreement was entered into between all the parties.)

L. A. Slabbert offered his share of the farm to the other proprietors for £1,050, but they refused to buy it.

The plaintiffs contended:

(a) That the award in no way affects or nullifies the terms and conditions of the contract of 27th August, 1868, and that the transfers of the sub-divided shares must be made subject to those terms and conditions, and that the defendants are bound to do all things necessary to pass the said transfers subject to such conditions.

(b) That the sale by the defendant, L. A. F. Slabbert, of his share to the defendant, A. P.

Momberg, is null and void, and should be rescinded, and that transfer should not pass of the said share to Momberg.

The defendants contended:

(a) That the award and agreement of 1891 nullify and cancel the 8th condition of the contract of August 27th, 1868. Or in the alternative, the 8th clause is null and void, and of no binding force or effect. Or in the alternative, that the plaintiffs have waived any rights they may have under the said 8th clause.

(b) That the sale to L. A. F. Slabbert of his share to A. P. Momberg is legal and valid, and that transfer thereof may be legally passed.

Mr. Rose-Innes, Q.C., for the plaintiffs: It is clear law that alienation can be restrained by deed as well as by will (*e.g.*) in the case of an ante-nuptial contract. The defendants allege that clause 8 of the contract is null and void but no reason is stated as to why it should be null and void. No doubt in theory the division of a farm is an alienation, but it is submitted that it is not such an alienation as was contemplated by the 8th clause of the contract.

In this case there is no dispute about the *dominium*. See *Sands Restraints upon Alienation* (1, 9, 8), and see *In re Pioneer* (Buch., 1878, p. 19).

There is nothing to show any waiver of rights by the plaintiffs.

Mr. Juta, Q.C.: It is submitted that the 8th clause is void *ab initio*. All promises or agreements by an owner not to alienate his land are void.

The Chief Justice: Does that not depend upon whether there has been a consideration for the promise or not?

Mr. Juta: The authorities are against that view. See *Sands* (4, 1, 1, *et seq.*) and *Voot* (8, 14, 20).

In any case the plaintiffs have waived their rights.

De Villiers, C.J.: The defendants' first contention is that condition (a) of clause 8 of the contract is void as being a restraint by contract on alienation. The condition is that "should any of the said appearers," i.e. the brothers and brothers-in-law, "at any time after the expiration of twelve months . . . be desirous to sell or otherwise alienate his share in the said farm, he shall be bound before selling or alienating such share to any other than the rest of the persons interested in the said farm, to offer such share to the rest of the said persons for a price bearing the same proportion to £1,500 which his share in the farm bears to the whole farm." At the time of making this contract the brothers and brothers-in-law were co-owners in undivided shares of the farm,

The promise of each not to sell his share to a stranger without first offering it to his co-owners was a good consideration for their promise to him not to sell their respective shares without first offering them to him. The interest which each thus acquired in the property was that before any of the co-owners could sell he had the right of purchase at a definite price. It is not a case, therefore, of a pact for the restraint of alienation without consideration given to the promisor or without any interest in such restraint on the part of the promisee. The passages from *Sande* (*Restraints*, Part 4) and *Voet* (*Comm.* 2, 14, 20), relied upon on behalf of the defendants, do not support their contention. Under the Roman law a naked pact could not give rise to an action but a pact attached to an actionable contract could be enforced. The Dutch law put an end to the distinction between naked and clothed pacts, but it still required a *causa*—a consideration, to support a pact. "An agreement," says *Sande*, with the owner that he shall not alienate his own property is inoperative, for there is here no *causa* by which such a pact can be supported. Now the *causa* required in order to make a restraint on alienation operative is not only consideration in the ordinary sense of the term, but, in addition, an interest in some one that the restraint should be maintained. The latter requirement is insisted upon by *Voet* as well as by *Sande*. What I take to be their meaning may be established by a few examples. An owner of a farm promises another that he will not sell the farm but receives no consideration for the promise. There being no *causa* whatever the promise cannot be enforced. An owner, in consideration of a sum of money paid to him by the promisee promises him that he (the owner) will never sell his own farm. Here there is such consideration as would support an ordinary promise, but the pact cannot be enforced because no one has any interest in the restraint being maintained, whatever remedy the promisee might have to recover back the money paid by him. If, however, it had been stipulated, in the last case, that upon the alienation of the property a fixed sum should be paid by the promisor there would exist a measure of damages which the promisor could be compelled to pay for his breach. Lastly, the owner of a farm undertakes, in consideration of a sum of money paid to him by a co-owner, not to sell his share to a third person without first offering it to his co-owner for a certain price. Here there exists the full *causa* required to support restraints on alienation. Not only has the promisor received consideration in the ordinary sense of the term but he has an interest, by reason of his right of

pre-emption, in the restraint being maintained. Even, therefore, if we apply *Sande's* subtle distinctions it is impossible to support the defendant's contention that the contract was void *ab initio*. They further contend that even if the contract was originally valid it was cancelled by reason of a subsequent agreement for a subdivision of the farm by arbitrators. If that agreement and the award were wholly inconsistent with the continued observance of the original contract, there would be ground for the argument that the parties intended to surrender their respective rights of pre-emption, but I cannot discover the inconsistency. It is true that the land has been partitioned so that each no longer holds an undivided share, but such partition is quite consistent with the right of each owner to the benefit which he has stipulated for in respect of his co-owners' shares. The third contention that the owners have by their conduct waived their respective rights to insist upon the restraint is, in my opinion, equally untenable. Some of the owners may have done isolated acts which the others could have objected to as being inconsistent with the original contract, but the fact that they did not object does not prove a renunciation by all the owners of their rights under the contract. Under certain circumstances a renunciation of rights may be implied from the conduct of the person entitled to them, but his conduct must be such as to leave no reasonable doubt on the mind that he not only knew what his rights were but intended to surrender them. In the present case all the owners knew what their rights were, but none of them has foreclosed himself from still enforcing those rights. One of the owners has sold his share to a co-owner without offering the share to the other parties to the contract for the price therein provided. As the purchaser had full knowledge of the condition the remaining co-owners are entitled to an interdict restraining the transfer. The special case must be decided in favour of the plaintiffs' contention, with costs.

Mr. Justice Upington concurred.

[Plaintiffs' Attorneys, Messrs. J. & H. Reid & Nephew; Defendants' Attorneys, Messrs. Scanlen & Syfret.]

TAYSEN V. JONKER.

1895.
} Aug. 12th.

Mr. McLachlan applied for an interdict restraining respondent from interfering with applicant's rights in respect of the water flowing in the Narooga River over the farm Elandsdrift, in the district of George; also from ploughing up the road leading from

applicant's homestead, and from trespassing and cutting poplar trees on lots B and C pending an action for a declaration of rights and for damages.

The Court declined to entertain the application until notice had been given to the respondent.

ROTHENBURG V. ROTHENBURG.

This was an application on notice to the respondent to show cause why the applicant, his wife, should not be allowed, under the 335th Rule of Court, to give her evidence on affidavit, she being about to leave for England.

Mr. Benjamin moved.

The Court made no order as the defendant appeared in person, and admitted the marriage, that there were three minor children, and that he was domiciled in the Colony.

JOUBERT V. WORCESTER MUNICIPALITY AND COLONIAL GOVERNMENT. { 1895.
Aug. 13th.
" 14th.
" 15th.

Watermill—Servitude—Grant—Diversion of water—Interdict—Forfeiture.

In 1831 the Governor sold and granted to the plaintiff's predecessor in title a plot of ground on condition that "the proprietor shall have no right or privilege whatever with regard to the main stream to supply the town of Worcester, save and except of using it for the special purpose of keeping the watermill at work" and that if the proprietor shall make any "deviation of the water he shall forfeit for ever the right or privilege of water hereby granted."

Before the grant no water was taken out of the stream above the mill for the supply of the town, but in 1874 the Municipality constructed waterworks diverting a portion of the stream above the mill and the Government, with the consent of the Municipality, also diverted a portion for railway purposes, but no objection was raised by the owner of the mill until 1892, when the capacity of the pipes for diverting the water was increased.

Held, that the grant constituted a servitude to lead the main stream over the mill for the purpose of having the full use of its water power, and that the plaintiff, as the present owner of the mill, was entitled to an interdict restraining the increased diversion.

The owners of the mill had for many years been in the habit of using some of the water for domestic purposes and for irrigating a small garden without any objection on the part of the Government or of the inhabitants of the town and without any perceptible diminution of the stream.

Held, that such user could not now be relied upon as a ground for forfeiting the plaintiff's servitude under the grant.

This was an action for a declaration of rights, for an interdict, and for damages, instituted by Mr. Johannes Jacobus Joubert, of Worcester, against the Commissioners of that town and the Commissioner of Public Works, as representing the Colonial Government.

The facts as stated in the declaration are as follows:

The plaintiff is the registered owner of a certain portion of land situate within the limits of the Municipality, which was originally granted to one Wouter de Vos, on the 21st November, 1831, for the purpose of erecting a mill, and it was provided in the grant as follows: "That the proprietor shall have no right or privilege whatever with regard to the main stream of water supplying the town of Worcester, save and except of using it for the special purpose to keep the water-mill at work. Should it, however, appear that any use be made of the said water contrary to this provision, and that such deviation be proved in any competent court against the proprietor, occupier, or overseer of the said mill, the proprietor shall be deemed to have forfeited for ever the right or privilege of water hereby granted, without being allowed any more to continue the use of it for the aforesaid purpose."

The stream referred to in the grant is led out from the Hex River, and the declaration alleged that before the year 1831, and continuously since that year, it has flowed in the same course from the Hex River over the plaintiff's land into the village of Worcester.

In the year 1874 the Commissioners, having obtained certain powers for the improvement of the water supply of the town by Act 23 of 1873, laid down pipes from the stream, and diverted at a point above the mill a certain portion of the water, to the use of which for the mill the plaintiff was entitled under the grant, and led the same into a reservoir below the mill, the pipes being four inches in diameter.

In the year 1886 the Commissioners substituted other and larger pipes, whereby a much greater

quantity of the water, to the use of which the plaintiff was entitled, was diverted from the stream at a point above the mill.

Thereafter in July, 1892, the Commissioners enlarged the outlet pipe of the reservoir and thereby diverted a still larger quantity of the water into the pipes. Against each of the acts of diversion in 1886 and 1892 the plaintiff protested.

The plaintiff alleged that the acts above referred to were wrongful and illegal, and occasioned him serious loss and damage in his water-rights, that he was unable on account thereof to work the mill as it had hitherto been worked by himself and his predecessors in title, and that he had sustained damages in the sum of £1,000 up to the date of the claim.

In 1875 the Railway Department of the Colonial Government, with the consent of the Commissioners, laid down pipes 3 inches in diameter, from a point higher up the stream than that at which the Municipality had diverted the water in 1892 to the railway-station below the mill.

In 1892 the Colonial Government substituted other pipes, 5 inches in diameter, and thereby diverted a much larger quantity of water, to the prejudice and damage of the plaintiff (as he alleged). The plaintiff protested against the division, which was wrongful and illegal.

The plaintiff said that the Commissioners had no power or authority to give any consent at any time to the Colonial Government to divert any portion of the water of the stream to the use of which he was entitled, and that by reason of the illegal acts of the Colonial Government he had sustained \$500 damages up to the date of the action.

The plaintiff claimed against both defendants :

(a) A declaration of rights.

(b) Interdicts.

(c) \$1,000 damages against the Commissioners, and \$500 against the Government.

The first-named defendants specially pleaded that portion of the water has, ever since 1831, been diverted before it reached the mill, and turned into a channel running over Municipal ground alongside the mill, and thence down to the town.

They said that the town of Worcester is entitled to the sole and entire benefit of the water in the stream, subject only to the plaintiff's right to make such use of it as is necessary to keep the water-mill erected under the provisions of the grant, or a water-mill of similar capacity, at work.

They said that the plaintiff greatly enlarged the capacity and machinery of the mill, and had used some of the water not merely to keep his

mill at work, but also to supply power for lighting his premises by electric light and for other mechanical purposes, and that he claimed a right to do so.

They denied that the plaintiff was entitled to the water diverted, and they said specially that the plaintiff, who was at the time a Commissioner of the Municipality of Worcester, consented and duly agreed to the works carried out in the year 1886.

They said that all the works referred to were necessary in order to enable the inhabitants of Worcester to obtain the benefit of the stream of water reserved for the use of the town ; and they further said that they had in no way deprived or been the means of depriving the plaintiff of the use of sufficient water to keep at work the water-mill originally erected by the plaintiff's predecessor or a water-mill of similar capacity.

They admitted the diversion made by the Government in 1892, but they said that the diversion was made without their consent and that they were in no way responsible for it. The Government in their plea alleged *inter alia* that the plaintiff or his predecessor in title had no right in respect of the main stream of water referred to in the grant save and except the right of using the stream for the special purpose of keeping at work the water-mill mentioned and referred to in the grant, as the mill was erected in the year 1831, which right the Government had at no time interfered with or infringed.

They said that on the 10th October, 1874, an agreement was entered into between the first and second named defendants, under which it was agreed that the Government should use water from the furrow, which should be taken therefrom at a point above the mill for the service of the railway.

That in 1875, in accordance with the agreement, the Railway Department laid down certain pipes, and at or from the point before-mentioned took, and since then have always continued to take, water from the furrow for the service aforesaid.

They admitted that in 1892 new pipes were laid down at the same spot in the furrow, but they said that though the new pipes were larger than the old, they had at no time taken water through any of the pipes referred to in violation of the rights of the plaintiff.

They said that since the grant was issued the plaintiff, on numerous occasions from time to time, without the knowledge of the Commissioner of Public Works or his predecessor in office, did divert and use portion of the water of the stream for irrigation and other purposes, in violation of the condition of the grant.

The Government claimed in reconvention that the Court might declare that the plaintiff had for ever forfeited the right or privilege of water conferred by the grant.

The plaintiff, in his replication, denied that the Government had any *locus standi* to pray for a forfeiture.

Mr. Juta, Q.C., and Mr. Watermeyer for the plaintiff.

Mr. Rose-Innes, Q.C., and Mr. Benjamin for the Municipality.

Mr. Schreiner, Q.C., A.G., Mr. Giddy, and Mr. Graham for the Government.

Mr. George Quin deposed that he had known the town of Worcester for the last fifty years and the mill in question. He bought the mill in 1869 from Mr. Du Toit. He owned it for nearly ten years. There were two pairs of stones, which he used in summer and winter when necessary. There was always sufficient water. He could always grind about six bags (about eighteen bushels) of soft wheat or about two and a half to three bags of hard wheat per hour without intermission. He sold the mill in 1878, and since then had seen the mill several times. Up to about 1874 the Worcester Municipality took all its water from below the mill, but they then commenced to take it from above the mill. The Municipality of Worcester had now increased largely in size, and the railway works were very extensive. He visited the mill last February, and saw that the stream was not sufficient to work two pairs of stones. The wheel was larger than the one existing in his time, but the machinery was improved, and with the larger wheel, and consequent greater leverage, the same stream of water, in his opinion, could work a larger wheel with greater ease than a smaller wheel. The garden which was served by the stream was about the same now as in his time.

Cross-examined by Mr. Innes: When he first knew the water furrow it was about the same in volume as now; but he was not positive about it. There were three pairs of stones in the mill at present. In his days he used only one pair of stones as a rule, but on occasions two pairs. There was sufficient water to work one pair in February last. The present wheel was a wooden one, fifteen to seventeen feet in diameter. The mill "race" had been raised since his time.

Cross-examined by Mr. Schreiner: The mill garden was irrigated by water taken above the mill. The present ground under cultivation was not larger than formerly.

John Cloete deposed that he was formerly Mr. Quin's miller, and was now in the employ of Mills & Sons. He remembered the Municipality laying down pipes in 1875. Up to that time there

was more than sufficient water to drive two pairs of stones. The water used for the garden could not affect the mill. The wheel at present in use could do twice the amount of work of the old one with the same water power.

Cross-examined by Mr. Innes: The last time he examined the mill minutely was about six years ago, before the new wheel had been put in. In the busiest time he used to turn out about fifty bags of ground stuff per day. A certain quantity of water always ran to waste around the mill.

Cross-examined by Mr. Schreiner: The taking of water by the Municipality made no appreciable deterioration on the mill stream, nor did that taken by the Railway Department affect the mill supply.

By the Court: Even in the dry season a certain quantity of water always ran to waste around the mill.

Frederick Simon said that he was a miller in the employment of Mr. Du Toit, Mr. Quin's predecessor, for about five years. During that time there was always sufficient water to work two pairs of stones; in fact, twice as much as was necessary. Parties had sometimes taken water above the mill for irrigation purposes, and witness had always stopped such proceedings.

Cross-examined by Mr. Innes: The water that ran to waste would be about half the stream, even in summer time.

Johannes Daniel de Wet said that from 1874 to 1891 he was engineer to the Municipality of Worcester. Up to 1874 the Municipality supplied the town with water by means of furrows through the village, and in that year pipes were laid down from the stream above the mill to the reservoir, and from the reservoir to the town; the pipes laid down were 5-inch. In 1879, 6-inch pipes (or about that size) were laid down from the intake; and then, in 1887, these in turn gave place to 9-inch pipes. Larger pipes were laid down in 1892 from the reservoir to the town. In 1874 there were only about a dozen people in the town who used the water; in 1887 there were about a hundred, and at present he believed there were about 200 people using the water. Much more water, of course, was brought to the town than formerly by means of the larger pipes. The railway also were taking a larger supply.

Cross-examined by Mr. Innes: He left Worcester in 1892. Mr. Joubert, the plaintiff, was one of the Commissioners at the time the 9-inch pipe was laid down, and he complained to witness, but he did not mention the matter to the other Commissioners, and the work was proceeded with.

Cross-examined by Mr. Schreiner: Witness advised 12-inch pipes, but the Commissioners decided upon 9-inch. He had heard that the Railway Department had to lay down new pipes because the old ones had worn out.

By the Court: In 1868 the water supplying Worcester was taken from below the mill, and every erf in the township had water. He thought there would not be sufficient pressure if the pipes had been laid below the mill, and that was the reason why the water was taken from above the mill.

John Brown Ellis said he was a civil engineer practising at Worcester. He had made a plan of the levels, which showed that the water below the mill was nine feet higher than the reservoir in use by the Municipality. The Municipality could easily get the same supply as at present by taking the water from below the mill instead of above it. He was at one time engineer on the railway. Undoubtedly the railway service, generally at Worcester, required much more water than formerly. He should imagine that the consumption by the railway had been continually increasing.

Cross-examined by Mr. Innes: In his opinion the town could be satisfactorily supplied from a point below the mill, and that there was sufficient pressure. He meant that the level was high enough to run water to the highest part of the town. There would be less pressure by two feet than at present.

Cross-examined by Mr. Schreiner: He was not a hydraulic engineer, and had not seen the report of Mr. Stewart, hydraulic engineer, whose report had been taken on the water pressure. He supposed the railway could not be served by water taken from below the mill. He was aware that in 1874 the railway put down larger pipes, but he did not know if the old pipes had become useless.

By the Court: It was a question of expense. If the Railway Department erected a pump and the Municipality altered their reservoir they could both take their water from below the mill instead of above it.

Cecil Wyburg, an engineer and millwright, said that he had been consulted at various times by Mr. Joubert, the plaintiff. He first saw the mill in 1880, and he last saw it in January. In January, 1892, he visited the mill, and there was sufficient water then to work the mill. There were three pairs of stones, but never more than two working, and there was sufficient water to drive two pairs. But when he saw the stream last January there was hardly sufficient water to drive one pair of stones. The improvements made in the mill rendered it much more easy to work, and the present larger wheel could be

worked with a less volume of water than the old one. There was a very small amount of water power used for the electric light, but that would make no appreciable difference.

Cross-examined by Mr. Innes: The bigger the wheel the less water was required, within certain limits. A given volume of water over a 14-foot wheel would transmit $9\frac{1}{2}$ horse-power and over a 17-foot wheel 13 horse-power. He measured the flow of water roughly last January and found it to be 360 cubic feet per minute. He did not consider that over much for a mill. He supposed that about one horse-power was used for the electric lighting of the mill.

Cross-examined by Mr. Schreiner: The present mill should have about 22 horse-power to be worked efficiently. He put up a wheel in 1885, replacing the original wheel, but it had to be taken down owing to the fact that the wear and tear was too great, and the present mill was then put up. He calculated that there was about $18\frac{1}{2}$ horse-power transmitted by the old mill. The 360 cubic feet per minute on the present mill worked out as $13\frac{1}{2}$ horse-power.

Re-examined by Mr. Juta: The machinery he put up required less water than the old.

By the Court: He could not say if the stream of water was stronger or weaker in 1880 than at present.

Joseph Benjamin Harcombe, a mechanical engineer, gave technical evidence on the relative merits of iron and wooden mill wheels.

Adrian Josephus Truter said that he had worked at the mill for the last eighteen years, and was now in charge of the mill. (The witness was examined at some length on the subject of the decrease of the water coming to the mill. Since 1892 less work had been possible than before that date.)

Cross-examined by Mr. Innes: It was only when the work was slack that the water was allowed to run to waste.

By the Court: The water at times had been so scarce that he could not grind the same quantity that he otherwise would have done.

Johannes Jacobus Joubert, the plaintiff, said he bought the mill in 1878. In 1886 he was one of the Councillors of Worcester, and he resigned in March, 1887, on account of some alterations which were made by the Municipality in putting down the 9-inch intake pipe. He agreed to the extension of the old pipe, but not to the larger sized pipes. He had the mill-race raised about 3 feet, so getting additional power for the mill, and he offered to give £3 towards the extension that the Municipality wanted in consequence of this raising of the mill-race. He had prepared some figures showing the effect of the diminution in the

water on his business. Up to 1892 he supplied the Kimberley market, but since 1892 he had been unable to do so, in consequence of the supply of water being insufficient in summer to work the mill to its fullest capacity. The figures he had prepared showed approximately the number of bags ground and his sales since 1890. He had received orders that he could not execute. He could have sold all the product of two pairs of stones, but since 1892 the water had been insufficient to work them; and he reckoned the grinding power of the mill now was at least 30 per cent. less than before 1892. In February and March last he only averaged seven bushels an hour. The electric light only absorbed about a half horse-power, and it was only used at night. The Municipality and the railway both used the water in much larger quantities than formerly. His profits in 1888 and 1889, when he had plenty of water amounted to about £4,000 a year, but in 1894 he made only £1,400. But the difference in profits was subject to speculation in wheat, &c. He reckoned his yearly loss, through the diminution in water, to be at least £400.

Cross-examined by Mr. Innes: His profits depended on the market. He was a dealer on a large scale. Last year and this had been dry years. He reckoned that if he allowed the present state of things to go on it would only be a matter of time when he would be deprived of the water altogether during the summer months. In 1886 there were about 100 water-leadings into the town of Worcester, and at present there were over 200. He allowed himself to be put on the Water Commission by the Municipality in order to look after his own interests. He was a Councillor at the time, but he only allowed his name to go on the Commission because he had important interests to look after. He never acted on the Water Commission, and did not know what the others on the Commission did. He resigned from the Municipality on account of the larger pipes being laid down. He wanted to bring an action then, but found that his transfer of the property was not in order. He then resigned his seat also on the Divisional Council. The previous owner did not object to the 4-inch pipes originally laid down in 1874, and he therefore did not object; it was the bigger pipe that was now doing him injury.

Cross-examined by Mr. Schreiner: The Railway Department had replaced the old 3-inch pipe by a 5-inch pipe. He was not aware that whereas the whole stream registered between seven and eleven millions of gallons per diem in different periods of the year the Railway Department only took 40,000 gallons per diem.

His mill had always been able to work one set of stones, but not two sets. When he first knew the mill there were two pairs in use. The Municipality in 1886 allowed him to raise the mill-race, but he did not think that in consideration of this they would wish to enlarge the pipes. He was aware that Mr. Stewart made a report as to the best means of supplying the Municipality with pure water. He put down his damages against the Railway Department as £500 nominally; actually he had suffered much more than that. He should say that the whole stream was just about as strong as it was twenty years ago; he could not say that there was a larger volume of water. He was aware that the Municipality spent some hundreds of pounds with the object of enlarging the stream from the Hex River, but it was a failure, and he persisted that the whole supply taken at Hex River was almost the same as formerly.

Re-examined by Mr. Juta: There had been a steady decrease in the supply of water over the mill, in proportion to the increased supply taken by the Municipality and the Railway Department.

By the Court: He did not object to the Municipality having the 4-inch pipe, nor to the subsequent 6-inch pipe, but he objected to the 9-inch pipe, because, although more water might not actually be taken than before, it would give the Municipality ground for further encroaching on his water supply. Regarding the Railway Department, he consented to the 3-inch pipe, but objected to the 5-inch pipe laid in 1892. The Municipality never objected to his using the water for irrigation.

This closed the case for the plaintiff.

Mr. Paul Bosman deposed that he had been one of the Commissioners of Worcester Municipality for about eight years, and was one of the Commissioners appointed to report on the plans submitted by Mr. Stewart, the expert, for an improved water supply to the town. Before that time there was a 6-inch pipe from the reservoir to the town, and pipes of different sizes were then laid down, some 6-inch, 7-inch, 8-inch, and 9-inch. There were, in 1892, 165 water-leadings in the town, and at the present time there were some forty or fifty more. The valves were always open. He knew the stream that ran round the mill in question, and had noticed that at certain seasons a great deal of water ran to waste. There were complaints from householders of insufficient water. Each householder was apportioned 300 gallons a day.

Cross-examined by Mr. Juta: Mr. De Wet was incorrect in stating that there were 5-inch pipes; they were 6-inch pipes. He was also in-

correct in stating that he regulated the valves—he did not do so. He supposed Mr. De Wet therefore grossly neglected his duties. As to the complaints of householders, he thought they would appear in the minutes of the Council. It might be that there were only three complaints in seven years. The town was growing very greatly, and besides the private inhabitants, they also had to supply other places—like the gaol and the cemeteries. There was only one fountain. He would correct this statement; Mr. Conroy had a fountain, but he (witness) was not supposed to know where the water came from; a Mr. Vogt also had a fountain, but he (witness) believed he only got his 300 gallons. The inhabitants had overflow pipes, and after the 300-gallon tank was filled the water ran to waste; every inhabitant had an overflow pipe, and the waste water, he supposed, from all the tanks in the town ran back into the water furrow. There were four street hydrants, but only a trial had been made with them. The 300 gallons he thought more than sufficient.

By the Court: There was a great quantity of water allowed to run to waste before the improvements of 1892. He did not know if the plaintiff, in his capacity of Commissioner, knew of this.

John Vogt deposed that he was turncock to the Worcester Municipality and had been so for nineteen years. The water always ran round the mill to waste. The sluice valve was always allowed to remain open, and the pipes were used to their fullest extent.

Cross-examined: The valves might have been partially closed in Mr. De Wet's time, but latterly they had been turned on full.

Mr. Thos. Stewart, hydraulic engineer, said he was asked by the Worcester Municipality in 1889 to send in a full report on the water supply, and he sent in a report accordingly. He found that 225,000 gallons ran into the reservoir in the twenty-four hours. His recommendations were not adopted entirely, but pipes of different sizes were laid from the reservoir to the town. He thought the increase in the water running would not be great, as the end of the pipe service remained choked as before and the pipes were not well laid. Theoretically, the utmost water that could enter at the intake, supposing the pipes were properly laid and everything was in order at the actual intake, would be 450,000 gallons per hour, but with the conditions existing the intake would be something considerably below that. Supposing it was 250,000 gallons per hour, and that it ran to the mill, it would represent, with the present wheel, not one horse-power practically. Supposing the Municipality

took all it possibly could out of the service of pipes—at an extreme limit 500,000 gallons per day—away from the mill stream, it would only mean a loss to the mill of two horse-power practically. Supposing that Mr. Wyburg was right in his computation that 360 cubic feet of water per minute went over the mill-race, it would mean 13 horse-power theoretically; but with the "over-shot" wheel only 75 per cent., practically, of that horse-power. It would mean about three and a quarter millions of gallons passing over the mill-race in the twenty-four hours; 85,000 gallons per day, the maximum that could be taken by the railway, would be '85 theoretical, '27 practical horse-power. Regarding the question of the practicability of feeding the town reservoir from a point in the stream below the mill, 8 inches effective level would be thus lost; and besides this, he was of opinion that the reservoir was already too low. So he could not advise any such course. Could not say even approximately what the cost would be of establishing such a system by the erection of pumps, &c.; 4 horse-power actual would give about three and a half bushels per hour under good conditions. Regarding the 300 gallons per day, he thought that a good supply to each inhabitant.

Cross-examined by Mr. Schreiner: He had not taken the levels as to the supply required by the railway.

By the Court: The object of the alteration would be to increase the flow of water to the town.

Jacobus Botha Henry Meiring deposed that he was chairman of the Worcester Municipality. He had lived there all his life—sixty-nine years. He thought the supply of water at the entrance of the furrow from the Hex River was now greater than formerly. (The witness was examined as to the various causes which had led to the increased volume of water.)

Cross-examined by Mr. Juta: The Government substituted the 5-inch pipe for the 3-inch pipe for railway purposes without the official consent of the Municipality. He did not raise any objection, but of course the Municipality would object if the railway took the whole stream. The Central Railway Company took water from the stream, and were still doing so, in spite of the remonstrance of the Municipality.

Wilhelm Nel said he had lived in Worcester all his life—sixty-seven years. He was a Councillor and one of the Water Commission that sat on Mr. Stewart's report. (This witness was also examined at length on the subject of the

intake from the Hex River, as compared with former times, and which he stated was now larger.)

Cross-examined by Mr. Juta: The town, he believed, was satisfied with its present water supply. He personally had more than enough.

Petrus Franceman, an old native, deposed that he worked at the mill in Mr. Du Toit's time, and gave evidence as to the capacity of the original mill, which only had one pair of stones at work, and used to turn out about seven muids of flour a day.

Andries, a coloured man, deposed that the flow from the Hex River was now much greater than in the old days. It had increased by one-half. He knew the mill before Mr. Du Toit's time, and it only worked one pair of stones.

David Franceman, a native seventy-six years of age, deposed that he remembered the mill from his earliest days. The furrow from the river to the mill was then much smaller, and the quantity of water much less than at present. The present stream was greater by at least one half. There had always, even in the dry times, been a quantity of water running to waste round the mill.

The Chief Justice said that if the Municipality wanted to show that they had the right to any increased water led into the furrow since 1831 they should have raised that point in their plea, and evidence to the contrary effect might have been brought by the plaintiff.

Mr. Innes argued that it was not necessary to state this in the plea. It was a question of the original grant. One of his points of defence would be that the plaintiff was entitled only to the amount of water in the furrow as it was in 1831, and that the enlargement of the furrow by the Municipality was not for the benefit of the plaintiff.

Mr. Juta said that the object of pleading was to give an opportunity to both sides of calling witnesses on the points raised, and that point had not been raised.

The witness was cross-examined by Mr. Juta: In the old days only one pair of stones was worked at the mill.

Johannes de Wet, a carpenter residing at Robertson, said that he went to Worcester in October, 1888, and started a turning-lathe in connection with the plaintiff's mill. The turning work consumed some of the water-power, and there was always enough water to work one pair of stones in the mill.

Fredk. Lindenberg deposed that he was secretary to the Municipality. There was no protest by Mr. Joubert against the 9-inch pipe recorded in the minutes of the Council. The first protest was by way of letter to the Council in 1892.

Even after the improvements were effected in that year, water ran to waste from the town reservoir. He had searched for the document of the original conditions of sale of the plaintiff's property without success. The correspondence that had been produced, referring to the original grant with the property, had been taken from the Colonial Office.

Cross-examined by Mr. Juta: Mr. Joubert made a representation to the Council with reference to the raising of the mill-race, but it was not recorded in the minutes.

Mr. Innes intimated that he had no further witnesses, and then Mr. Schreiner called

Arthur Dodwell Chapman, who deposed that he was engineer to the Cape Government Railways on the Worcester section. He had gauged the volume of water just above the point where the railway pipe was introduced, with the view or proving that the Government was not taking an unreasonable amount of water. He measured it, but only unscientifically, and found the volume in May, 1898, was over eleven million gallons every twenty-four hours. He measured it again in the following December and found the volume to be 7½ million gallons. At that period the pipe used for the railway was a 3-inch one, and highly corroded and rusted. This was substituted by the present 5-inch pipe, and he had measured carefully and ascertained that the maximum quantity of water that could come through the 5-inch pipe was 83,000 gallons every twenty-four hours. The railway actually now used about 37,000 gallons per diem, while formerly it used about 27,000 gallons per diem. If the Railway Department were compelled to take the water from a point below the mill, it would necessitate roughly a pumping power costing about £300 a year over and above the first cost.

Cross-examined by Mr. Juta: The quantity of water required had not increased so very much. He had not provided himself with any figures on the subject. The Central Railway Company took the water in turn from the Cape Government Railways, but he did not know when this was started. There was a valve in the 5-inch pipe which was kept partially closed, so as to allow only the 37,000 gallons a day to pass through to the railway reservoir. The water was not gauged that came out of the reservoir.

Re-examined by Mr. Schreiner: The laying down of the 5-inch pipe cost about £600. That was expense incurred to obviate the necessity of pumping.

By Mr. Innes: The 37,000 gallons supplied all the railway requirements, including the workmen's cottages and the engines.

By the Court : There was a little waste sometimes from the reservoir. He should say, however, that waste water was not generally running. Although it was a 5-inch pipe, a 3-inch pipe clear of sediment and rust would carry the water used.

The Chief Justice intimated that he would like to recall the witness François with the view of questioning him on certain points.

François (recalled), in answer to the Court, said he was seventy-six years of age. He remembered the water-furrow being on the farm in Wouter de Vos's time, that was to say the De Vos who made the mill. De Vos constructed the mill when witness was about twelve years old. No mill existed there before then. When he constructed the mill he diverted all the water there was from its former course. Witness was referring to the stream Langerug. Half the water went over the mill wheel. There was too much water for it all to go over the mill. The stream was a pretty large one, the furrow being about three feet across. The stream so diverted was twice as large now as then, as the stream of Roodewaal had been added to it. He could not say when Roodewaal was added.

By Mr. Juta : He lived and worked on the farm Vleyplaats when the mill was constructed, about an hour's distance from the mill. It rained a great deal more then than at present. There was more water. The Langerug stream was there before 1831; it was there when the place was established. In 1831 the water only came out of the spruit, but the stream was bigger.

The Chief Justice : Was there more water then in the Langerug furrow than now?—I mean in the river.

Mr. Juta : There was more water in the river that ran past the Langerug furrow?—A great deal more.

The Chief Justice : But he does not say in the Langerug furrow. (To Mr. Juta) If the case is postponed is there any reason to believe that you will be able to produce any further evidence whether in point of fact there is not more water flowing over the mill now than then, and which is being utilised through the Roodewaal furrow, instead of being separate as before?

Mr. Juta : Neither Mr. Joubert nor the local attorney know of anything. That point has not been raised in the defendants' plea.

After argument for the plaintiff,

Mr. Chapman was then recalled.

The Chief Justice : How much water did the 8-inch pipe convey down before it was corroded?

—Witness : Theoretically, 40,000 gallons. But I

may mention that it would be impossible to get that 40,000 through, as a 3-inch pipe would very quickly corrode.

A 5-inch pipe 85,000?—Yes.

The Chief Justice (to Mr. Juta) : It might save a good deal of time and further expense if you consented at once to 300,000 gallons, because we can postpone the case for the purpose of enabling you to give evidence rebutting the evidence given by the defendants.

Mr. Juta : How much would your lordships give to the Railway Department?

The Chief Justice : I think 40,000 gallons, which they could have got with a 3-inch pipe.

Mr. Juta : But they didn't.

The Chief Justice : But they could have got it. Of course they can get about 85,000, which if they are entitled only to 40,000 would be an infringement of your rights.

Mr. Justice Upington : I may tell you at once, Mr. Juta, that I hold the view that the water supply has been considerably increased by the Municipality.

Mr. Juta : My client will take that.

The Chief Justice : What about the seasons? Is it to be confined to certain months during the summer season?

Mr. Juta : Yes, certainly, my lord.

The Chief Justice : Which months?

Mr. Juta : The months will be December, January, February, March, and April. April, I am told, is sometimes very dry.

The Chief Justice : Would you include December?

Mr. Juta : Yes, my lord. That allows them November, at any rate, to use it in.

De Villiers, C.J. : It appears from the evidence that as far back as the 10th of August, 1829, Wouter de Vos purchased the land upon which the mill is now situated from the Government. The conditions upon which the sale took place are fairly set out in the advertisement which appeared in the "Gazette" of the 3rd of July, 1829. The Civil Commissioner there announces that there will be sold by public auction this plot of ground for the erection of a water mill, and that the person building the mill shall have the right to turn the watercourse over the wheel of a mill. It is quite clear that it was intended then to give the right to lead the whole of the watercourse, which was then in existence, namely, the Langerug watercourse, and to use the water-power of that watercourse for the purpose of turning the mill. I think we may take it that before De Vos got transfer he constructed his mill, because when the grant was made on the 21st of November, 1831, that grant speaks of the

mill as already being in existence. Under that grant there can be no doubt that a right or privilege to use this watercourse, to divert and use this watercourse, for the purposes of the mill, was given. The words are: "The proprietor shall have no right or privilege whatever with regard to the main stream to supply the town of Worcester, save and except of using it (that is the main stream) for the special purpose of keeping the water-mill at work." Then it proceeds: "If the proprietor shall make any use of the water contrary to this provision, and if this shall be proved in any competent Court against the proprietor, the proprietor shall be deemed to have forfeited for ever the right or privilege of water hereby granted, without being allowed any more to continue the use of it for this purpose." I may at once dispose of the claim in reconvention of the Government that there has been a forfeiture—that there has been such a deviation of the water as to create a forfeiture. In fact the Attorney-General has not really pressed this point. It has been proved that there has been some small amount of irrigation, which did not perceptibly diminish the stream. This irrigation was well known to everybody. I put the question, and it was said that everybody in Worcester knew that the proprietors of the mill were using the mill water for irrigation, and that no objection was raised at the time. And this paltry deviation of water for the purpose of irrigating a few trees cannot, I think, after this lapse of time, justify the Court in holding that the proprietors of this mill have forfeited their right to the water. Well then there is the servitude. And *prima facie* anyone taking out water above the mill infringes upon the servitude. The defendants, however, say that they have not deprived the plaintiff of any of the quantity of water that went over the mill at the time of the grant, which was made so far back as 1831. But it is quite impossible now from the vague evidence to say exactly what was the quantity of water that then flowed over the mill. That it was a very large quantity of water is pretty clear from the answer given by the Civil Commissioner to the inquiries of the Governor. The question was, "Does the mill-stream run constantly of sufficient strength to work a mill, or will it require to be collected in a dam?" The answer was, "The stream has been running of sufficient strength to work the largest mill, and requires at no season to be collected in a dam." The Attorney-General says: "The Civil Commissioner says 'the largest mill.' That is, the largest mill known to him. But still, we do

not know what was the largest mill known to Mr. Truter. For all we know, he may have known of mills such as we do not know of now. There is no evidence upon that point." It may be gathered from this statement that a very large stream of water was flowing here, and that stream of water was used for the purposes of the mill. Now it is said that a great deal of water was not actually used for the mill. But the servitude *aqueductus* applies to the whole stream; and if the proprietor had only put a small mill there, it did not prevent his leading the whole of the water which came on the Municipal grounds at that time. We must bear in mind that at that time, 1831, there seems to have been no thought of supplying the town of Worcester with water by means of water-leads to the different houses. In those days, in the country towns and villages, it was considered quite sufficient to have a water-furrow going through the town, the water in the furrow supplying the inhabitants with water. I myself recollect the time when the people of Worcester obtained their drinking supply not by means of pipes laid from a reservoir, but out of the water-furrow which ran down along the streets of the town, and that was contemplated in the year 1831. Now if there had been a plea in this case to this effect: "True it is that we have taken out a certain quantity of water, but we have placed a certain quantity of water in the stream which was never there before, we now claim such water as additional water"; and there had been clear and decisive evidence upon it, I am not sure that the defendants would not succeed. But there is no clear evidence upon this point, and if such a question were raised, we should have to postpone the case for the purpose of enabling the plaintiff to rebut the evidence on this point. I think it is far better now to deal with the case at once. It is the opinion of both judges that if at any future time the Municipality should see their way clear to increase their water supply, and they give due notice to the plaintiff of such increase, they will be entitled to take out of this watercourse such additional water. But it should be done with due notice, so that the plaintiff may be in a position to say what the quantity of water is. So that any interdict which may be given in the present case will not affect the rights of the defendants at any future time to increase the water supply going into this furrow, after giving due notice to the plaintiff. But I think there is proof that there has been some increase in the water supply. How much it is, it is impossible for the Court to decide. Now we find that in the year 1874, after the Municipality

had obtained the right by Act of Parliament to raise money for waterworks, they led water at a point of the watercourse above the mill, and no objection was raised to that. The plaintiff admits that he raises no objection after allowing it for so many years. The Government, however, in 1874 laid a 3-inch pipe, from which they diverted water up to the year 1893, when they laid a 5-inch pipe. Plaintiff also admits that after allowing that 3-inch pipe for so many years, he can no longer object to that water being taken out. And considering the increased water supply which the Municipality have drawn into this furrow, I think the plaintiff is wise in not objecting to that water being used in future. In 1886 the supply led into the Worcester reservoir was further increased by increasing the dimensions of the pipe at the intake, and the effect of that undoubtedly has been to increase the quantity of water supplied to the reservoir. But the greatest abstraction was effected in the years 1892 and 1893. In the first of these years the Municipality found that the water-leadings of the town were increasing, and they increased the outlet pipe of the reservoir and led out considerably more water for the inhabitants than they had done before. I am satisfied that their intention in 1892 was to take more than they had taken up to that time—more than they had taken in the abstractions of 1874 and 1886. And if an interdict were not granted now restraining the Municipality from taking the quantity which I think they did intend taking in the year 1892, I am of opinion that there will be a serious diminution of the rights of the plaintiff, and that the plaintiff was justified in coming into court to prevent such further diminution. Mr. Stewart has shown that in March, 1889, when he was at Worcester, there were 225,000 gallons per diem flowing down into the reservoir, but I think that from the evidence the fair average of water flowing down from 1892 every day might well be taken to be 300,000 gallons. But under the present arrangement the Town Council could take 400,000, which is in excess of the 300,000 gallon which they, under all the circumstances, are entitled to. As to the Government, the 3-inch pipes could lead down 40,000 gallons a day, and I have no doubt that at first, before the pipes became corroded and covered with sediment, that 40,000 gallons did flow down, and the plaintiff did not object to that. But under the present arrangement 85,000 gallons can flow down. It is true that there is a valve, but the plaintiff has no control over the valve, and I think that by laying down that 5-inch pipe there was such an invasion of his rights, with the possibility of taking out the whole quantity

of water, as to justify him in coming to the Court for relief. As to damages, I do not think that there has really been much proof, but it seems to me that the plaintiff is entitled to come to Court to prevent any further interference with his rights. In my opinion, 300,000 gallons a day will amply suffice for the needs of the Worcester Municipality for a long time to come. Even if Worcester should become such a growing town as was suggested, I have no doubt that it will be able to purchase water-rights from Mr. Joubert. In the interval, I think that 300,000 gallons a day will go very far to supply the wants of the town. As to the Government, they use 87,000 gallons a day for all their purposes. Therefore if they get 40,000 gallons I think that will be quite enough for their needs for a long time to come. So that taking everything into consideration, we are of opinion that an interdict ought to be granted restraining the Commissioners of the Municipality from using more than 300,000 gallons a day during the months of December, January, February, March, and April, and interdicting the Commissioner of Crown Lands from using more than 40,000 gallons a day during that period. And inasmuch as it has been shown that more than these quantities would have been used by the defendants respectively if the plaintiff had not brought his action, I think that the defendants must pay the costs of this action.

Mr. Justice Upington: I am of the same opinion.

The Court further ordered that each of the defendants pay half the costs.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Attorneys for the Municipality, Messrs. Van Zyl & Buissinné; Attorneys for the Government, Messrs. J. & H. Reid & Nephew.]

ADMISSION. { 1895.
Ex parte BERNING. { Aug. 15th.

On the application of Mr. Close, Frederick Simon Berning was admitted as an attorney and notary.

REHABILITATION.

Mr. Sheil applied for the rehabilitation of Carl Edward Schnitzler and Max Hermann Peycke, formerly carrying on business as Schnitzler & Peycke.

The application was granted.

THE PETITION OF EDWARD J. DEARHAM.

Mr. Close, on behalf of petitioner, applied for leave to sue by edictal citation in an action against his wife for restitution of conjugal rights failing which for divorce, by reason

of her malicious desertion, for custody of the minor children of the marriage, and forfeiture of his wife's half-share in the community of property.

The Court granted the order, personal service if possible; failing which, one publication of the order to be made in the "Star" (Johannesburg), the "Standard and Diggers' News" (Johannesburg), and in the "Government Gazette." The process to be returnable on the last day of term.

IN THE MATTER OF THE WESTERN PROVINCE BANK.

Mr. Innes applied for an order placing the said bank under operation of the winding-up clauses of Act 12 of 1868, appointing the liquidators of the voluntary winding-up as official liquidators, and fixing a date for the proof of all outstanding claims.

The Court granted the order, fixing December 1 as the last day for receiving claims of outstanding debts to be proved. The order to be advertised in the "Paarl" newspaper.

CAPE OF GOOD HOPE BANK, IN LIQUIDATION.

Mr. Innes presented the eighth and final report of the official liquidators of the Cape of Good Hope Bank, and applied for leave to be granted to one of the official liquidators, Mr. J. H. Reid, until September 15 next.

THE PETITION OF THOMAS S. STARCK.

Mr. Sheil applied for leave to the applicant to sue by edictal citation in an action against his wife for divorce by reason of her alleged adultery.

The Court granted the order, and made the same returnable on the last day of term, personal service if possible.

OLIVIER V. STRYDOM.

Mr. Tredgold applied for an order setting aside the notice of trial in this suit, and removing it from the roll on the ground that the pleadings are not closed; also, that certain notice of motion for a commission *de bene esse* served by the plaintiff has not been finally withdrawn, or the costs thereof paid, and further, for removal of the said cause for trial to the Oudtshoorn Circuit Court.

Mr. Juts, for the respondent, opposed the application.

The Court refused the application, but set down the trial, which is fixed for Tuesday, to be heard on September 2, respondent to be allowed to have his witnesses examined on commission,

the Resident Magistrate of Oudtshoorn being appointed commissioner. The costs of the present application to abide the result of the trial, but the costs of August 8 to be borne by the respondent.

IN THE INSOLVENT ESTATE OF JOHANNES J. SCHONKEN.

Mr. Molteno applied for authority to the Master of the Supreme Court to call a meeting of creditors of the said estate for the purpose of electing a trustee in place of the late Frans J. Broers, originally elected, certain deeds of transfer to which the said Schonken was a party prior to his insolvency requiring correction.

The Court granted the application.

BARRINGTON V. THE COLONIAL GOVERNMENT.

Mr. Innes applied for an order on behalf of the plaintiff removing the suit between the parties for trial to the next ensuing Circuit Court for Knysna, on the ground that a considerable number of plaintiff's witnesses reside in that district, and that the costs will be materially reduced.

Mr. Giddy, for the respondents, opposed the application.

The order was granted, costs to be costs in the cause.

SUPREME COURT.

[Before Sir HENRY DE VILLIERS, K.C.M.G., (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

FRYER V. LOUW'S EXECUTRIX.

Mr. Innes applied for provisional sentence for £123 on a promissory note.

The order was granted.

VAN DER WESTHUIZEN'S TRUSTEE { 1895.
V. STEYN. { Aug. 16th.

Undue preference—Insolvent Ordinance, sections 84 and 90—Pleadings—Tender.

In August, 1894, S. advanced to W. £62, as security for which W. pledged to S. certain live-stock.

In the following October W. having bought certain carts on credit allowed S. to sell two

of the carts and out of the proceeds to pay himself the £62, whereupon S. redelivered to W. the pledged stock, the value of which was found by the Court to be about £40.

W. surrendered his estate in January, 1895.

Held, in an action by the trustee of W.'s estate against S. that the payment by the insolvent to S. in October, 1894, was an undue preference to the extent of £20, the difference between the amount of the payment and the value of the pledge.

Where it is intended to rely on the 90th section of the Ordinance that section should be pleaded.

This was an action instituted by the trustee of the insolvent estate of J. W. van der Westhuizen against the defendant, a farmer residing in Karreekloof, in the district of Hope Town, to declare a certain transaction null and void, and an undue preference under the 84th section of the Insolvent Ordinance. The insolvent surrendered in January, 1895.

The declaration alleged that in October, 1894, the insolvent delivered to the defendant, to whom he was at that time indebted in the sum of £62, certain two carts, of the value of £50 each, and authorised the defendant to dispose of the carts, and to retain a sufficient amount of the proceeds to satisfy the debt of £62.

That the defendant did in October, 1894, acting with the authority and on behalf of the insolvent, dispose of the carts, and with the consent of the insolvent retained the sum of £62 in payment of the amount of his claim, and returned the balance of the purchase price to the insolvent.

That at the date when the carts were so delivered and sold, and when the sum of £62 was retained by the defendant with the consent of the insolvent, the latter contemplated the sequestration of his estate, and intended to prefer the defendant before his other creditors, and that the transaction was an undue preference under the provisions of section 84 of the Insolvent Ordinance.

The plaintiff claimed :

(a) An order clearing the transaction and undue preference and null and void under the 84th section.

(b) An order compelling the defendant to pay the plaintiff in his capacity the sum of £62 and costs.

The defendant specially pleaded that at the time of the transaction the insolvent was indebted to him in the sum of £62 for money advanced, and for which the insolvent had

signed a promissory note, and as security for the payment of which debt the defendant held certain stock, viz., 123 sheep and goats and eight head of cattle, pledged to him by the insolvent.

He said that the transaction was *bona fide*, and that upon payment of the debt of £62 he released the stock and handed the promissory note to the defendant.

For a further plea he alleged that the transaction was in the ordinary course of business, and protected by the 86th section of the Ordinance.

The replication to the first plea was general, and as to the further plea the plaintiff denied that the transaction was in the ordinary course of business, and he said, that if the Court should be of opinion that it was, that there existed a collusive arrangement between the insolvent and the defendant, the one to give and the other to get a preference over the other creditors, and that the transaction was not protected by the 86th section.

On these pleadings issue was joined.

Mr. Rose-Innes, Q.C., and Mr. Tredgold for the plaintiff.

Mr. Sheil and Mr. Buchanan for the defendant.

Paul Johannes van Coller, the plaintiff, said the estate was surrendered on January 16, 1895. The deficiency was £499 according to the schedules put in. All the debts were in existence in October, 1894. The outstanding debts amounted to £118, but were worthless. The immovable and movable property realised £130—immovable £95 and movables £34 16s. 7d., and they were the assets against a liability of £804. Apart from the claim in this case, there would be about £100 to distribute amongst the creditors after allowing expenses.

By the Court: Insolvent was a farmer, and speculated in live-stock and carts. Farmers and shopkeepers gave him credit.

Witness (continuing) said that between October, 1894, and January, 1895, the insolvent disposed of certain of his assets, 400 sheep and four carts, but they would not have made up anything like the difference between the assets and liabilities. Witness considered that insolvent was insolvent in October. He kept no proper books, only notebooks. The first information which witness received as to the pledge was in the plea. Insolvent did not mention it at the meeting of his creditors. The 400 sheep cost £219, and the four carts £180.

Cross-examined by Mr. Sheil: The Widow Steyn, the insolvent's mother-in-law, had the usufruct in three farms. Two of the farms would be worth about 5s. per morgen, exclusive of improvements. He could not give the value of the farm in the Prieska district. He did not know that the Widow Steyn, shortly before

the insolvency, was about to give transfer to the heirs of their shares in the farms, and renounce her life interest. Her age was fifty-two or fifty-three, he thought. The insolvent's interest in the farms was sold for £95.

Walter Henry Curlewis, of the Paarl, said he went on trading trips up-country for the purpose of selling carts. In April last he sold two carts to the insolvent at £45 each, which had been paid for, and in September he sold four carts to insolvent for £180 the lot, £50 each for two of them, £40 each for the other two. He had not been paid for the four carts sold in September.

Cross-examined: He did not press insolvent to buy the carts.

Pieter Bernardus de Ville, wagon and cart maker, of the Paarl, deposed as to selling four carts to the last witness in September last. They were made of well, seasoned wood. £180 would be a fair price for them.

This closed the case for the plaintiff.

For the defendant,

Johannes W. van der Westhuizen, the insolvent, deposed that he was a farmer and speculator. He surrendered his estate on January 16, 1895. By "speculator" he meant that he speculated in sheep and other stock and a few carts. In April last when he bought the two carts from Curlewis, he gave the latter a promissory note for the price, which matured, he believed, in the middle of August. Steyn lent £62 to witness, out of which he paid Curlewis £40 on the promissory note. He gave Steyn 123 or 124 sheep, one horse, and one mule as security. He also gave Steyn a promissory note containing particulars of the stock pledged. He thought he gave this promissory note to his trustee with his other papers. The delivery of the sheep to Steyn was made before he made out the promissory note. The delivery took place on Steyn's farm, which was about nine miles' distance from witness's farm. When he bought the four carts from Curlewis for £180, Curlewis pressed him to buy them. Witness offered Steyn two carts as security for the £62, but at first he declined to accept them. Eventually, however, he accepted them as security, on the understanding that witness and himself went on a trading expedition to sell them. Steyn sold the first cart for £42 10s., and exchanged the second for twenty head of cattle. Witness allowed Steyn to keep the £42 10s. in part payment of the £62, and sold Steyn the twenty head of cattle to pay off the remainder of the £62. Witness was not insolvent at the time. His assets consisted of 120 sheep valued at 7s. 6d. each, 450 valued at 10s. each, nine head of cattle worth £3 or £4 each, over £100 in outstanding debts

which he considered good, and an eight share in the Widow Steyn's farms which he valued at £700 or £800. He married a Miss Steyn, and his mother-in-law had promised to give him transfer of an eighth part of her estate, there being eight children. The value of the Widow Steyn's farms was about 9s. or 10s. a morgen, and he considered that if he had received transfer of a value of one-eighth of her estate it would have been worth £700 or £800. When he considered himself solvent he took the value of this promised transfer into consideration. He did not contemplate sequestration when he had the transaction with Steyn. There was no collusive arrangement between them. In September Steyn advanced him another £5 with which to pay Curlewis. Witness bought forty-eight sheep from him in November, at 10s. each, for which he gave a promissory note.

Cross-examined: He bought 450 sheep for £219, which he had not paid yet, and sold them at Kimberley through one Higgs for £180, of which sum £90 came to him, after deducting Higgs's commission and expenses. Of that £90 his trustee had not received a penny. He bought the 450 sheep in September and sold them in October. He thought that the Widow Steyn was going to give him transfer of an eighth of the estate, but he did not tell his trustee anything about it, because he was asked no questions on the point. He had not paid a penny of the £180 for the four carts. He sold them in October, but his trustee had not received a penny of the money he received for them. At the meeting of creditors he said, "I had a prospect of paying for the carts if I sold them at a profit." He sold them at a loss because the horses were knocked up.

Re-examined: He became insolvent before the Widow Steyn could effect the transfer.

Johannes Martinies Jacobus Steyn gave corroborative evidence as to the transaction with the insolvent. When he transacted the business with him he did not know that Van der Westhuizen was about to become insolvent. He valued his mother's land at 12s. 6d. per morgen. His father had paid £1,500 for 1,500 morgen of this same land. The insolvent still owed him £45, for which he had proved in the estate.

Cross-examined: He did not know insolvent's affairs at the time that he received payment of the £62, or he would have adopted a plan to recover the £45, which was still due to him. He did not prepare the insolvent's schedules, although he valued the goats and land. The low figure at which the goats were valued in the schedules could be accounted for by the fact that they became scabby after they had been

redelivered to the insolvent. He was aware that they only realised 2s. 11d. at the sale.

Jan Hermanus van Enter, residing on the farm Karree Kloof, spoke as to witnessing a promissory note made by Van der Westhuizen to Steyn in favour of the latter, in consideration of money borrowed. Witness could not remember now what were the contents of the document, but he saw sheep, goats, and cattle handed over by Van der Westhuizen to Steyn.

Cross-examined: Steyn asked him to witness the document. Steyn wrote it out. The document was made out for £60 odd, as far as he could remember. He could not say when the note was due. The sheep and goats, a horse, and a mule arrived on the evening before the morning on which the note was signed.

Charles Ludovicus Higga, residing at Karree Kloof, gave corroborative evidence, he being a second witness to the promissory note signed by the insolvent in favour of Steyn. The note was made out either for £62 or £63, for which 124 sheep and goats, a horse, and a mule were given by the insolvent as security. Subsequently an addition was made to the note, stating that instead of the horse and mule the insolvent would give Steyn eight head of cattle as security. He witnessed this addition to the conditions of the promissory note.

Jan Peters, a Hottentot boy in the service of Steyn, said he remembered some sheep and goats, a horse, and a mule being sent to his master's farm from Van der Westhuizen's about two months before the New Year.

Cross-examined: They all arrived together. The goats got scabby after arriving at Steyn's farm in consequence of their mixing with scabby sheep, which belonged to servants on the farm. His master's sheep and goats were all free from scab.

The witness Van Coller (recalled) said that no such document as the promissory note referred to had ever been handed to him by the insolvent.

By consent the vendue roll was put in.

Mr. Rose-Innes, Q.C., for the plaintiff: The evidence is clear that when the payment was made by the insolvent to Steyn in October the former was hopelessly insolvent, and as that transaction took place within six months before the sequestration, the onus is on the defendant to prove that the insolvent did not contemplate the sequestration of his estate.

The insolvent must have contemplated sequestration, as he knew what his position was in October, and when once contemplation of sequestration, is established intention to prefer follows as a matter of course. *Van Renon's Trustee v. Abel* (1 Sheil, 332).

The insolvent practically defrauded Curlewis that the defendant, his brother-in-law, might be paid.

If the Court should find that the pledge, which is set up in the plea, but to which the insolvent made no reference in his examination before his creditors, did really exist then the plaintiff is entitled to succeed and obtain judgment for the difference between the payment and the value of the pledge, and to ascertain the value of the pledge the insolvent's schedules and the vendue roll should be looked.

If the plaintiff had been aware of the pledge when the declaration was drafted a tender to indemnify would have been made. See section 90 of the Ordinance.

Mr. Sheil for the defendant: Although under the 8th section of Act 38, 1884, the onus is on the defendant to show that the insolvent did not contemplate the sequestration of his estate when the transaction now impeached took place, this onus is only shifted on to us when the plaintiff has clearly proved in the words of the section that the insolvent's liabilities fairly calculated exceeded his assets fairly valued when the transaction took place.

Now this is a pure question of fact and the only person who can throw any light on the subject is the insolvent himself.

He tells us that his assets at the time of this transaction did considerably exceed his liabilities. He gives a list of his assets, and these assets very considerably exceeded the claims proved against his estate.

The defendant cannot be prejudiced by the fact that the insolvent over-estimated his assets.

In *Ziegler's Trustee v. Liebermann, Bollstedt & Co.* (5 Sheil, 230), the insolvent Ziegler valued his goods at £12,420, whereas they only realised £4,464, yet the High Court held that notwithstanding this enormous over-estimate that the insolvent did think himself solvent when he gave the defendants the bond impeached in that case.

And on appeal to this Court the judgment of the Court below was sustained.

So that even if the Court were satisfied that an over-estimate had been placed upon his assets by the insolvent that fact cannot prejudice the defendant in this case.

If however the Court should be against us on this first point—if the Court should be of opinion, notwithstanding the insolvent's evidence, that his liabilities fairly calculated exceeded his assets fairly valued, then the next point for consideration is whether the defendant has satisfied the onus which is cast upon him by the section.

It is clear law that notwithstanding section 8 of Act 38, 1884, the meaning of "contemplation of sequestration" as defined by the Privy Council in *Tharburn v. Stewart* still remains unchanged. That section merely raises a presumption of fact. Lord Cairns in that case said: "The Court judging of the fact must be satisfied that the payment was made in the view and in the expectation of a supervening bankruptcy, and in order to disturb what would be the proper distribution of assets under that bankruptcy. In other words, intention to prefer must be clear as well as contemplation of sequestration. And the same construction was put upon the 84th section in *Hugo's Trustees v. Lindenberg* (2 Juta, 187).

And to the same effect was the judgment of the Court in *Trustees of Du Ploy v. Draper & Plemman* (7 Juta, 337).

There is no evidence of intention to prefer Steyn. If there was an intention to prefer anyone it was to prefer Curlewis, to pay whom the money was borrowed from Steyn.

It is submitted therefore that even if we have not satisfied the onus cast upon us by the section the plaintiff has still to prove that there was an intention to prefer.

The existence of the pledge is not seriously disputed, but the Court is asked to enter into a calculation to ascertain whether, when the cattle were redelivered to the insolvent, the goats were worth 3s. or 4s. each. The maxim *de minimis non curat lex* applies.

It is submitted that ample consideration was given by the defendant and that he should succeed in this action.

Mr. Rose-Innes, Q.C., in reply.

Judgment was given for the plaintiff for £20 and costs.

The Chief Justice said: The amount in dispute in this case is small, but the principles involved are important. I am satisfied that at the time when the payment of £62 was made by the insolvent to the defendant the insolvent's liabilities fairly valued exceeded his assets fairly estimated, and seeing that the transaction took place within six months before the insolvency, under the Act of 1884 the onus is thrown upon the defendant to show that there was no contemplation of sequestration at the time when the payment was made. In my opinion, there was a contemplation of sequestration. Under the Act, as well as in fact, I am satisfied, in looking carefully over the schedules which the insolvent presented within a few months afterwards, that he must have known in October that he was hopelessly insolvent. His assets were about the same; his liabilities were about the same, and at the time when his schedules were presented, his assets stood at £304 19s., and

his liabilities at £804 10s. Now, those few months could not have made that great difference—a deficiency of £499 11s. out of £804 10s. I am satisfied also that when the £62 was paid by the insolvent to the defendant, he intended thereby to prefer the defendant before his other creditors. He must have known that the effect would be to prefer the defendant before his other creditors, and he must be deemed to have intended so to do. It is quite clear, then, that but for the fact that at the time the £62 was paid certain stock which had been pledged by the insolvent were redelivered to him the plaintiff would be entitled to succeed on the entire claim in the present case. There is no claim in the declaration for a forfeiture, on the ground that there was collusion between the parties. The question is raised in the replication, but it is not necessary now to decide upon that, inasmuch as we are clearly of opinion that there was no transaction which falls within the ordinary course of business. The only question, then, is whether the fact that these goods were redelivered—that these sheep and goats were redelivered—by the defendant to the insolvent—should affect our decision in the present case. The 90th section of the Insolvency Ordinance provides for cases like this. The section is somewhat obscure in its language, but it is quite clear under this section that even where goods which have been pledged have been restored, the Court is justified in giving judgment for the amount of the undue preference if the trustee is willing to indemnify. The section ought however to have been pleaded and a tender made. There is some difficulty in the present case in ascertaining what the true value of the sheep, goats, and cattle was at the time when they were redelivered by the defendant to the insolvent. But fortunately the defendant himself has come to the assistance of the Court, not by the evidence which he gave to-day, but by the affidavit which he made on the 4th of December, 1894, that is within three months after this transaction had taken place. In that affidavit the defendant states that the immovable property enumerated in the annexed schedule is to the best of his knowledge and belief of the value therein set forth, namely, £130 The goats are estimated at 3s. each—101 goats at 3s, £15 3s.; cows, calves, and heifers, altogether £12. These seem to me to be pretty much the same articles which had been pledged to the defendant, and which had been redelivered by him. Now it is said that the sheep and goats had greatly deteriorated in value in the short time between the redelivery and the sequestration. Upon this point the evidence, to my mind, is

most unsatisfactory. There is no explanation as to why the goats, which remained on the same farm, should suddenly have fallen in value from 7s. each to 8s. each, and why the other cattle should also have suddenly depreciated in value to the extent to which we are now asked to believe that they have depreciated. It is said they had got the scab. But that is no explanation as to why these particular goats, more than any other goats on the farm, should have got the scab. It seems to me that this was an afterthought. I am by no means satisfied that these goats, when redelivered by the defendant to the insolvent were of much greater value than they were when valued by the defendant himself in December. Now taking the value of these articles, they come altogether, as valued in December, to something like £38 3s. Of course, I have added the twenty-two sheep that were slaughtered, at the full sum of 10s. each, which leaves £38 3s. Now add £3 or £4 to that and there is still a difference between the £62 and the value of these cattle—or what I consider the value of these cattle—of something like £20. This is a small sum, as I said before, and under ordinary circumstances the Court would probably not have approved of this action being brought, but in my opinion the trustee was amply justified under the circumstances in bringing the action. It is just one of those cases in which by means of family arrangements amongst people in the country creditors are defrauded. Here we have Mr Curlewis, an honest trader, going about the country selling his carts, he sells four carts to the insolvent for £180 in August and a month afterwards, the defendant and the insolvent together go on a trading trip with the carts, and sell them for a great deal less than the insolvent paid for them just a month before. Now, the defendant must have known at the time that the insolvent had not paid Mr. Curlewis for these carts. I cannot credit it that he was not aware that the £180 had not been paid for these carts. Then one of these carts was sold for £42 10s., and another was exchanged for cattle, which, when they came to be realised, were sold for £28. The one cart, for which the insolvent had paid £50 a month previous, was sold for £42 10s., and the other was practically sold for £28, also within a month afterwards. And this was done by the two combining, the defendant with the insolvent. I am satisfied that the defendant must have known about the carts and the price that was paid for them when this transaction took place. Mr. Curlewis, when he is distant from the scene of the transaction, is practically defrauded by these people selling these carts

when both of them had full knowledge that the insolvent would never be able to pay Curlewis what he had promised to pay him for the carts. Therefore, although the amount is small, the Court holds that the trustee was justified in bringing this action for the purpose of having this question settled. Seeing that the trustee is prepared to indemnify the defendant, and seeing that there is no evidence before the Court except the defendant's own statement three months afterwards as to the value of these cattle, and adding to that a small amount, there is still left £20, for which amount judgment must be given for the plaintiff with costs. As to the pledge and the promissory note, and as to whether the whole thing is a conspiracy or not, I do not wish to express any opinion; but it seems to be that it is an extraordinary circumstance that the promissory note is not forthcoming. There is no explanation.

Mr. Sheil said his client was not to blame for that. Due notice had been given to the other side to produce it.

The Chief Justice: I am satisfied that if the trustee had ever had it in his possession he would have known of it. I am quite satisfied that he never got it.

Mr. Innes applied for the expenses of the trustee to be allowed.

The Court granted the application.

[Plaintiff's Attorney, Gus Trollip; Defendants Attorney, Paul de Villiers.]

SUPREME COURT.

[Before Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

WILLEMS V. WILLEMS, *alias* { 1891.
WILLEMS VAN DER ZEEL { Aug. 19th.

This was an action for restitution of conjugal rights, failing which for divorce, instituted by the plaintiff against her husband on the grounds of malicious desertion.

The defendant was sued by edict, and the intendit alleged that the parties were married on 26th November, 1889, and that in August, 1891, the desertion took place.

Mr. Tredgold appeared for the plaintiff. The defendant was in default.

Mr. Norman Lacy gave formal evidence and produced the marriage certificate.

Mrs. Susanna W. B. Willems, the plaintiff, deposed that the marriage took place at the Paarl on the 26th November, 1889. Her husband signed the certificate Wilhelm Willems van der Zeel, explaining that the Zeel was the name of the place in Holland where his people had property. Her husband was a doctor but did not practise; he always seemed to have means. He left for Holland on the 18th August, 1891. He wrote from Teneriffe, London, and Marseilles; he in fact seemed to be travelling all over the world. In November, 1892, he wrote an affectionate letter from Madras. He sent her money, amounting in all to about £30. The last remittance was in July, 1892. There were no children of the marriage. In his last letter he told her not to write until she heard again, and she had accordingly not written, not knowing his address.

The Court granted a decree of restitution of conjugal rights, ordering defendant to return to or receive the plaintiff on or before the 30th November, failing which the defendant to show cause on the 12th December why a decree of divorce should not be granted with costs. Personal service if possible, failing which one publication in an Amsterdam newspaper having a circulation in the East Indies.

SUPREME COURT.

[Before Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

MARAIS AND CO. V. J. M. BEYERS. { 1895.
MARAIS V. J. M. BEYERS AND { Aug. 22nd.
H. BEYERS.

These two cases were heard together.

In the first Mr. Juta, Q.C., applied for provisional sentence for the sum of £268 4s. on a bill of exchange, dated 11th June, 1895, and payable on 21st July, 1895, made by Harry Beyers and accepted by the defendant.

In the second case he moved for provisional sentence on a promissory note for £500 made by Harry Beyers on the 31st May, 1895, payable on 1st August, 1895, signed by the defendant as surety and co-principal debtor.

The defence was a denial of the defendant's signature, the same being, as he alleged, a forgery.

Mr. Graham for the defendant.

Mr. J. C. A. Stuuke, of the Deeds Office, produced bonds and powers signed by the defendant as J. M. Beyers, J.A.son, and others signed J. M. Beyers, A.son.

Mr. J. H. Marais deposed that he resided at Stellenbosch, and knew the defendant. Last year he had a transaction with Harry Beyers, and the result was that witness gave Beyers a cheque for £500, and Beyers gave him a promissory note endorsed by his father, J. M. Beyers. The cheque was cashed and duly returned from the bank. The promissory note was due on the 1st December, 1894. He handed the note to Mr. Van Renen, cashier of the Stellenbosch and District Bank, for the purposes of collection. When it became due, Harry Beyers asked him to renew it for six months, which he did. The new bill was not paid on the due date, and it was noted. Harry Beyers asked for another renewal, but witness placed the matter in the hands of Mr. Cluver, the attorney of the District Bank. Beyers paid the interest, but no part of the capital, and the renewals were therefore for £500. Subsequently witness was told that Harry Beyers had left for Bulawayo, and he then asked his father, Mr. J. M. Beyers, about the bill; but he replied he would not settle it; he had paid quite enough for his sons, and would pay no more. Also that the signature was a forgery.

By the Court: Between the time that he received the bill in May, 1894, and the time he finally asked him for payment in August, 1895, he never told the father that he had a document signed by him. He rested quite satisfied. He only lent the £500 as a friend, and received only 6 per cent. interest.

By Mr. Graham: He had heard that young Harry Beyers had been adventurous. That he ran away to England, enlisted in the Guards, and was bought out again by his father.

Mr. Paul Cluver, attorney, deposed that the bill was handed to him on the 31st December last to be noted. He would not like to say that the endorsement "J. M. Beyers" was written by Mr. Beyers if he denied the signature, but on the face of it he should say it was his signature. He duly posted a notice of dishonour on the due date to J. M. Beyers. He understood afterwards that Mr. Beyers said he was not responsible, because the signature was not his.

Cross-examined by Mr. Graham: He sent the notice through the post by letter. That was the custom. He was aware that Harry Beyers was a man who spent a good deal of money.

Mr. G. Roos, partner in the firm of Marais & Co., said he had known Mr. J. M. Beyers for twenty-five years, and had often done business with him. In his opinion the acceptance of the bill now before the Court was his signature. Harry Beyers last year was carrying on a butchery business at Stellenbosch, and did business with the firm under a guarantee given by his father to Marais & Co. In February of this year he gave up the butchery, and went in for speculating. The guarantee was sent to Mr. J. M. Beyers for signature, and it was returned duly signed by him. (Guarantee produced.) It was for £600. Eventually Harry Beyers exceeded that amount, and his firm wrote to Mr. J. M. Beyers, pointing this out, and suggesting that he should give the matter his consideration. No reply was received. The bill for £268 fell due, and his firm wrote on the 3rd August pointing this out, in reply to which they received a letter stating that he would call with his son, Harry Beyers. Subsequently J. M. Beyers said he was not responsible as his signature was a forgery.

Cross-examined by Mr. Graham: Harry Beyers handed his firm an unlimited guarantee from his father, but it was not approved of and they gave it back to Harry Beyers, who afterwards gave them his father's guarantee for £600. Harry Beyers owed his firm at the present moment about £1,050.

David François Marais, one of the partners of Marais & Co., deposed that he told the defendant in April last that his son Harry had overdrawn the amount of the guarantee, and that Harry had applied for a further advance of £110, which he had refused. But subsequently they received from Harry Beyers his (the father's) acceptance for that amount, and it was advanced. He (witness) told Mr. J. M. Beyers that they had received this acceptance from him, and he replied that it was all right. Was certain that he had this conversation.

Cross-examined: There was no other person present at the conversation.

By the Chief Justice: He told his partners of the conversation; but he did not doubt the genuineness of the signature at any time, and he only mentioned that Mr. J. M. Beyers said it was all right in ordinary conversation with his partners.

Mr. Roos (recalled) said he distinctly recollected the last witness stating that he had had such a conversation with Mr. J. M. Beyers.

Johannes Stephanus Marais, partner in the plaintiff firm, deposed that he had never doubted that the signatures were genuine. He had seen defendant's signature many times.

Mr. Rudolph Cloete van Renen, manager of the District Bank of Stellenbosch, deposed that Mr. J. M. Beyers was a director and chairman of the bank, and he had become thoroughly acquainted with his signature. He had always thought the signatures before the Court were genuine, but since Mr. Beyers repudiated them, he had been in doubt. Between the 1st and the 6th August there were several transactions through the bank between the father and the son, and the sum of £150 was made payable to his daughter by a cheque drawn by the defendant in her favour on the bank.

By the Court: This was the only occasion on which the defendant made out so large a cheque in his daughter's favour. He did not know when Harry Beyers disappeared.

Mr. Graham said it was on the 6th August.

This closed the case for the plaintiff.

Jan Martinus Beyers, the defendant, said that the acceptance given by his son, Harry Beyers, for the £268 4s. purporting to be endorsed by witness, and the £500 promissory note, also purporting to be signed by him, did not contain his signature. They were both forgeries, and he knew nothing of the bills. He had not authorised his son nor anybody else to sign his name. On the 1st August his son Harry confessed to witness that he had forged his name. The last he heard of his son was in a letter sent by him from the Cape Town Railway-station in which he said that he was going to Bulawayo to sell five farms to pay his debts. Subsequent to the receipt of this letter he swore to an affidavit charging his son with forgery.

Cross-examined by Mr. Juts: He was a director of the bank, but he did not mention to his co-directors that the signatures were forgeries. He did not know the bill for £500 had been discounted by the bank; he knew nothing whatever about the bill. On the 1st August Berg, a clerk in the bank, came to his house with a bill in his hand, and witness said he would have nothing to do with it. He knew nothing of the guarantee given by his son to Marais & Co. That was also a forgery. He received a letter from Marais & Co. mentioning the guarantee, but he did not reply, because he did not consider it necessary.

Re-examined by Mr. Graham: His son went to the Transvaal and lived there for some time, during which he was clerk to the Chief Justice of the Transvaal. Previously he ran away to England and enlisted in the Guards, and he (witness) bought him out. There was at the present moment a warrant of apprehension against his son for forgery.

By the Chief Justice: His son acknowledged the forgeries on the 1st August. He, notwith-

standing that, gave him cheques for £35 and £36. He (witness) knew his son was a forger, but nevertheless gave him the £35 on the 1st August and the £36 on the 5th August. He gave him those amounts for the purpose of paying Mr. Marais, of the Paarl. He gave his daughter a cheque for £150 on the 5th August, in order to pay sundry debts of his own. The butcher, baker, and people about the place were all paid out of it. He never gave Marais & Co. any guarantee, and when he received the letter on the 29th July from Marais & Co., stating that the guarantee was exceeded, he did not, being an uneducated man, understand its full meaning, but he was angry that his son should have given his name as a guarantee. He did not communicate with Marais & Co.

The defendant (recalled) deposed that he kept a book (produced), which showed all his bill transactions with his son, and that neither of the bills alleged to be forgeries figured therein.

Mr. Graham was heard for the defendant.

The Court granted provisional sentence as prayed, with costs.

The Chief Justice said: It has been said that there are other bills purporting to bear the defendant's signature which are in circulation, and that any decision in this case adverse to the defendant must prejudice him in the other cases. Well, we can only deal with the two documents which are before us, and we can only deal with the evidence upon those two documents, and our decision upon them will have no bearing on any other documents sued upon. If these documents are forgeries, and can be proved to be forgeries, then the defendant will have a good defence. We have now to deal with two documents, one for £500 and the other for £268 4s. The document for £500 is a renewal of previous bills, and it has been proved that on the 1st December, 1894, when one of the previous bills fell due, the notary of the bank which had the bills for collection sent a notice to the defendant as the endorser, giving notice of the bill being due. No answer was returned, and subsequently the note was renewed, and on the 31st May, 1895 the bill now in dispute was made. I am quite satisfied, from Mr. Cluver's evidence, that he sent the notice to the defendant. The defendant, however, now says that his son told him that he had intercepted the letter, and that he (the son) had torn it up, but it does strike me as strange that the son should give the father this particular information when really the father could have known nothing about it at the time. So far as the father knew at the time, this bill of the 31st May, 1895, might have been quite a new

bill, but even if it had been a renewal, I cannot credit the statement that when the alleged confession was made by the son, that the particular renewal of which notice had been given on the 31st December, 1894, was mentioned by the son to the father. I am satisfied that the father got a notice that that bill was due. Then, when on the 1st August the note of 31st May, 1895, fell due, notice of that was given by the notary, Mr. Cluver, and in addition to that, verbal notice was given by Van Renen, through his clerk, Berg. The defendant's statement is that the son thereupon made a confession to him that the document was a forgery, whereupon the following letter is written by the defendant to the bank manager: "Best friend,—Henry's bill with Mr. Marais falls due to-day. Let it remain until Mr. Marais comes back. Then I shall speak to him about it.—Your friend, J. M. Beyers." This letter admittedly bears the signature of J. M. Beyers, and on comparing it with the signature on the document sued upon, I confess I can see no difference at all between the two signatures. Now, if it had been a forgery, and the father for the first time then discovered the forgery, whatever his paternal affection for his son might be, I think he would at once have said that he never endorsed such a document, and that if his name appeared on such a document it was a forgery. Nothing of the kind is done. But after this date the father gave cheques to his son for things he says he bought from his son, and the father now wishes us to believe that he gave these cheques to his son in the hope that the son, whom he had discovered to be guilty of forgery, was to be so honest as to devote the proceeds of those cheques to the part payment of the bill. That statement it is impossible to believe. Nothing is said to the man who is defrauded, Mr. Johannes Marais. He is left in the belief that it is a genuine document, and it is only when the son is fairly out of the way that this gentleman who is defrauded is informed that it is a forgery. At that time the defendant had already received a letter of demand from the other plaintiffs in respect of the document on which they sued, and it is only after he received that letter of demand that he took any proceedings. *Prima facie*, I am of opinion that this document is a good one; that it bears the defendant's signature, and I can see no difference between it and the other admitted signatures, and the defendant's conduct in this matter satisfies me that his memory is playing him entirely false now when he says they are not his signatures. In coming to the other document, the one given in favour of Marais, of the Paarl, it is a bill drawn by

Harry Beyers upon the father on the 21st July : " Please pay to J. S. Marais or order the sum of £268 4s." This purports to bear the signature of the defendant, and this signature also he now denies. Comparing that signature with the genuine signature put in, I confess it is impossible to see any difference. If it is a forgery, it is certainly one of the most skilful forgeries possible, but at all events it is so like the admitted signature that the onus lies upon the defendant to show that it is not his signature. Now in this case the defendant's conduct also has been perfectly inconsistent with his not having accepted this bill. I should otherwise have been inclined to sympathise with him, because he is an old man who has had troubles with his son. He had a strong paternal affection for his son, and he went out of his way to assist his son, and I am quite satisfied that he must have given Marais the guarantee mentioned. He was very anxious to assist his son, and he must have given that guarantee. The reason why I say he must have given the guarantee is because, when he was informed by Marais of the existence of the guarantee he did not instantly repudiate it as one would have expected him to have done. When the question was put to him in the box as to what he understood by the letter he received from Marais, of the 21st July, he at first fenced with it, and only on pressure admitted that he understood from that letter that the Marais' believed they held from him a guarantee for his son's debts. Well, he acted in a manner quite inconsistent with his not having given the guarantee. He did not answer the letter, and he says he meant by not answering to convey to the Marais' that he had not given such a guarantee. It is said that silence gives consent, but the defendant now gives the Court to understand that by his silence he meant the contrary. Then again, we find several documents, other bills which had been given by the son to the Marais', and which had been subsequently returned by the Marais' on renewals being given. These documents were left by the son in the hands of Marais & Co. Well, if he had forged them one would have thought that when other documents replaced them he would at once have withdrawn and destroyed these compromising documents. But he leaves them in the possession of J. S. Marais & Co. Then we have the conversation which Mr. D. F. Marais says took place at the Strand between him and the defendant. In that conversation, Mr. Marais says he told the defendant that he had first of all refused the son any further credit because he had overdrawn the amount of the guarantee; and

that he had then given further credit because the son had brought a written guarantee for the debt with his father's endorsement. Now if the father had not endorsed that bill and had never given the guarantee, surely he ought then to have repudiated it, unless we believe that Mr. D. F. Marais is swearing falsely. It has been urged upon the Court not to find against the defendant because it will be tantamount to finding that the defendant has committed perjury; but if we find for the defendant we must convict Mr. D. F. Marais of perjury, because his evidence is decisive. He says that when he arrived back at the Paarl he told his partners of the conversation that had occurred, and one of the partners, recalled, confirms this. Well, if we believe Mr. D. F. Marais it must shake the confidence of the Court in the accuracy of the defendant. I am not saying that the defendant is wilfully swearing what is false, but it shows that his memory is playing him very false. Then after the note fell due for £268 4s., notice was sent to the father, and the answer given by the father is not, "I never accepted any bills of that kind," but to the effect that he will wait. He wrote: "I received your letter dated 3rd August. My son has gone to town with his horses to sell them. When he returns I will come with him to the Paarl to see you." Now is that a letter that would be written by a man who had just discovered that his signature had been forged, even if it is by his son, unless, indeed, he intended ultimately to take up the bill? It is a letter I cannot believe he would have written if he believed at the time that he had not incurred some liability to the Marais'. Under all the circumstances, I think, not only on account of the similarity of the alleged forgeries to the genuine signatures, but on the rest of the evidence, that they are strongly against the view which Mr. Graham has so ably urged upon the Court, and we have come to the conclusion that we should at all events give provisional sentence.* By giving provisional sentence it is still open to the defendant to go into the principal case, but I would not encourage him to do it. The only circumstances, so far as these two bills are concerned, under which he ought to expect the Court to reverse its view, would be the conviction of the son of the forgeries. But though even then the Court would not be bound to hold them to be forgeries, at all events it would be strong ground for re-opening the case. But at present, with the evidence before the Court, we must give provisional sentence for the amounts claimed in both cases with costs.

Mr. Justice Upington: I have arrived at the same conclusion with some pain, taking into account the age of the defendant and the possibility of his attempting to screen his son. But I must say I am not satisfied with his explanation about the cheque for £150.

[Plaintiffs' Attorneys, Messrs. Findlay & Tait; Defendant's Attorney, C. C. de Villiers.]

COLONIAL ORPHAN CHAMBER V. BESTER.

Mr. Buchanan applied for an order finally adjudicating the defendant's estate.

The order was granted.

MOSTERT V. LE ROEX.

Mr. Graham moved for provisional sentence for the sum of £90.

The order was granted.

ABRAHAMS V. IMMELMAN.

Mr. Close applied for provisional sentence for the sum of £36.

The order was granted, with interest from the date of the summons.

Ex parte DE VILLIERS. { 1895.
Aug. 22nd.

On the motion of Mr. Close, Mr. Bernhardus Josephus van de Sandt de Villiers took the oath, and was duly admitted as an attorney, notary, and conveyancer of the Supreme Court.

Ex parte GUSH. { 1895.
Aug. 22nd.
Sept. 12th.

Mr. Benjamin applied for the admission of Mr. Frank Gush, an attorney of the Supreme Court of Judicature, England, at present residing at the Paarl, as an attorney of the Supreme Court.

It transpired that the applicant was a constable at the Paarl.

The Chief Justice said: The Court would like some further information as to the career of the applicant since he was admitted in England, and the applicant should also, living so near Cape Town, personally appear before the Court.

* * * * *

Afterwards on the 12th September, the application was renewed.

No opposition was offered by the Law Society, and the Resident Magistrate of the Paarl testified to the general good character of the applicant since his employment as a sergeant in the police at the Paarl.

The applicant took the oaths and was duly admitted.

The Chief Justice said: The calling of a constable is as honourable as any other profession; at the same time, when an English attorney changes his profession on arriving in this country, and afterwards applies to be admitted, the Law Society should satisfy itself that the applicant is a fit and proper person to be an attorney of the Supreme Court.

ROUSSOUW'S EXECUTOR V. OLIVIER.

Mr. Innes, Q.C., applied on behalf of the defendant for an order removing the notice of bar filed by the plaintiff, and for an extension of time within which to plead, by reason of the distance at which the defendant resides, and the few postal facilities in his vicinity.

Mr. Juta, Q.C., opposed the application.

The Court granted the order as prayed, plea to be filed within seven days, costs to be costs in the cause.

BICOARD'S TRUSTEES V. VISAGIE.

Mr. Juta, Q.C., applied on behalf of the defendant for an order postponing the trial of the suit between the parties from 31st instant, so as to allow sufficient time to the defendant to procure the attendance of his witnesses, who reside at considerable distances from the village of Calvinia.

Mr. Molteno for the respondents in the application.

The Court set down the case for hearing on Wednesday, the 4th September.

HORWITCH'S TRUSTEE V. TWENTY-MAN AND CO. { 1895. Aug. 23rd.

Undue preference—Insolvent Ordinance, sections 84 and 86—Transaction in the ordinary course of business.

T. & Co., the holders of an overdue promissory note, having received information that H., the maker of the note, of whose financial position they were ignorant, was about to hold a sale of cattle, sent the note to the auctioneer for collection, there being no bank in the village.

The auctioneer, with the consent of H., deducted the amount of the promissory note from the proceeds realised by the sale of the cattle and remitted it to T. & Co.

This transaction took place in April, 1895, and in the following month H. surrendered.

Held, in an action by H.'s trustee against T. & Co. to have the payment of the note declared an undue preference, that the transaction was in the ordinary course of business and was protected by the 86th section

This was an action to have a certain transaction declared an undue preference and null and void under section 84 of the Insolvent Ordinance. The declaration alleged that the insolvent surrendered on 8th May, 1895.

That on 6th April, 1895, at a time when his liabilities exceeded his assets, the insolvent paid of to one Marais, the defendant's agent, the sum £78 11s. 2d., being an amount due by the insolvent to the defendant in respect of a promissory note which matured in December, 1894.

That at the time the payment was made the insolvent contemplated the sequestration of his estate, and intended to prefer the defendant before his other creditors.

The plaintiff claimed that the transaction should be declared an undue preference, and that the defendant should be ordered to refund the £78 11s. 2d. with costs.

The defendant admitted the payment, denied the contemplation of sequestration and intention to prefer, and specially pleaded that the transaction was in the usual and ordinary course of business, and that it was protected by the 86th section.

Mr. Juta, Q.C., and Mr. Graham for the plaintiff.

Mr. Rose-Innes, Q.C., and Mr. Tredgold for the defendant.

Mr. E. R. Syfret deposed that he was sole trustee in the insolvent estate of Horwitch. It was a voluntary surrender. The liabilities were £438, and there was practically nothing beyond payments of promissory notes for £60 and £78. The £60 note has been paid since the insolvency. (Statement of insolvent's affairs on 5th April.—Liabilities, £731 13s. 3d.; assets, £287 16s. 1d.; deficiency, £443 17s. 2d. and on 6th April, after payment to defendants, liabilities: £653 2s. 1d.; assets, £209 4s. 11d.; deficiency, £443 17s. 2d.—put in.) When the insolvent made the payment to Twentyman he was hopelessly insolvent. In consequence of certain statements made by the insolvent at a preliminary meeting of creditors, he (witness) demanded the repayment into the estate by Twentyman of the £77 6s. 2d. Mr. Marsh, who held a promissory note for £60, gave it back to witness. There were sales, and the proceeds of the sales were in the shape of these promissory notes, given by the

purchasers, and which were handed over, that for £60 to Marsh and that for £77 6s. 2d. to Twentyman. The latter was paid, but Marsh returned his note to the estate. Twentyman thus obtained payment in full, but the other creditors would get practically nothing. Mr. Twentyman, finding there was to be a sale, sent to the auctioneer and asked him to pay him the money owed by Horwitch out of the proceeds; he (Twentyman) paying the auctioneer his commission. This was an undesirable way of doing business and might lead to fraud.

Cross-examined by Mr. Innes: There is no bank at Tulbagh. The insolvent was a "togt" trader, which class did not usually keep a stock in trade. Of course he did not impute any dishonesty to Mr. Twentyman, but he thought such a system of doing business, as employing an auctioneer in circumstances like the present, opened the way to fraud. It was really because a Mr. Marais was the auctioneer that he raised the objection to the transaction in this case. The gross proceeds of the two sales of Horwitch's stock realised about £400. His liabilities on the 30th March were £832.

S. Horwitch, the insolvent, deposed that he surrendered his estate in May last. In March and April he held two sales; the last sale was conducted by Mr. Marais, who deducted £78 and paid it to Mr. Twentyman. Witness objected, but Marais the auctioneer said it was too late, as the money had already been sent. He passed a promissory note for £60 to Messrs. Marsh & Sons. Their manager Parker took it, he, witness, did not give it.

Cross-examined: On returning from the last "togt," he brought over 800 sheep and goats, but owing to the dry season, they were in very poor condition. He called on Mr. Twentyman in Cape Town, and told him he would pay him as soon as the stock was sold. After the Tulbagh sale, the auctioneer (Mr. Marais) told him he had sent the £78 to the defendant, and gave him £77 by cheque and £10 in cash as the balance of the proceeds of the sale. He paid certain creditors in full with this. After the sale he had a meeting of his creditors, and asked for time, but they told him to do what Mr. Syfret told him to do, and he surrendered his estate.

Re-examined: Mr. Syfret took everything; he had not even enough to pay for his dinner.

By the Chief Justice: He first knew he was insolvent when he arrived in Cape Town from his last "togt." If Twentyman had been at the sale himself, and insisted on being paid, he did not know if he would have paid him or not. He always thought his creditors would wait, and

that they would not make him insolvent, and he did not know otherwise until after Twentyman was paid.

Bartholomew Henry Parker deposed that he was manager to Marsh & Sons, to whom Horwitch owed, in January last, an overdue open account of £123. He agreed to wait, and in the early part of April he returned from "togt" and gave witness a promissory note for £60, which witness took, not for himself, but for the benefit of the creditors generally. He told witness that he could not pay his creditors, that £78 had been taken by Twentyman without his consent, and that the promissory note for £60 was all he had left. Witness then took the promissory note in trust for the creditors, telling the insolvent so.

This closed the case for the plaintiff.

Edward Maitland Twentyman, partner in the defendant firm, called by Mr. Innes, deposed that the firm's previous dealing with the insolvent was satisfactory, in the present transaction he gave witness a promissory note for £77 6s. 2d. This was not paid, and witness was informed from an outside source that the insolvent was about to hold two sales, one at Tulbagh. He determined therefore, in accordance with his usual custom, to send the promissory note to Mr. Marais, the auctioneer at Tulbagh, with a request to him to deduct the amount from the proceeds of the sale. Subsequently Mr. Marais remitted the amount less commission. At that time he knew nothing of Horwitch's position one way or the other. He acted in this case as in several others in which his firm had dealings with people going on "togt."

Cross-examined: This was the first time that an auctioneer had deducted an amount like this from the vendue roll. The amount was overdue, and of course one never was sure of payment until the money was in hand.

P. J. P. Marais, auctioneer at Tulbagh, and deputy sheriff there, deposed that he had acted as the agent of merchants on several occasions in relation to sales held at Tulbagh by "togt" traders, to whom they gave credit. The proceeds of Horwitch's sale were £165, and witness told him that he held the promissory note for £77 6s. 2d., and Horwitch raised no objection to its being paid. It was not true that he had already forwarded the amount to the defendants. He knew nothing then of the insolvent's position. The insolvent gave the receipt put in.

By the Court: He had often done the same thing before when employed to collect accounts from proceeds of sales held by him. He could not, however, call to mind any specific case in

which he had told the "togt" trader employing him as auctioneer that he would collect an account for another party out of the vendue roll of the sale.

Examination continued: If the "togt" trader objected to paying an account in that manner, of course he (witness) would be powerless. He had collected accounts in that way for several firms, including Eaton, Robins & Co. and Fletcher & Co. There was no bank at Tulbagh.

Cross-examined: It was not true that he told Horwitch he had actually sent the money. He only said he had the bill for collection, and asked him if he would pay it.

Daniel Ferdinand Faure, the last witness's clerk, corroborated.

The insolvent (recalled) deposed, in answer to the Court, that the merchandise which he bought from the defendants he mixed with other creditors' goods. The sheep sold by Marais were proceeds of "togt."

The Court, after hearing the arguments, gave judgment for the defendants with costs.

The Chief Justice said: For the purpose of this case the Court will assume that there was contemplation of sequestration and an intention to prefer, but there still remains the question whether the transaction does not fall within the 86th section of the Insolvents' Ordinance. The defendant has pleaded that the payment was made in the usual and ordinary course of business, and if the Court finds that this plea has been proved, then *prima facie* the payment must be held to have been *bona fide*, and without an intention to prefer, unless collusion is proved. Well, in this case collusion has not even been alleged, much less has it been proved by the plaintiff. The only question, therefore, is whether the payment of the note was in the ordinary and usual course of business. Now, much stress has been laid, on behalf of the plaintiff, on the correspondence that took place between the defendants and Marais, their agent, before the payment was made. In the first letter, written by Twentyman & Co., they said: "We are informed you will hold a sale of stock on Horwitch's account next Friday. We have an overdue bill for £77; if we send it to you, will you deduct the amount from the vendue roll, and remit to us?" Now the answer to that is not "I will deduct the amount," but it is this: "I am in receipt of your letter respecting the above, and I will see what I can do to secure payment"; upon which the defendants write: "In accordance with yours of yesterday we enclose Horwitch's bill for £77, and trust you will secure

payment of capital and interest if possible." This letter does not insist on the deduction of the amount; it is left to the discretion of the agent, who is employed by the defendant to do his best. That is the result of the correspondence; but even if the correspondence had been quite to the purport stated by Mr. Jura, the Court would have had to look at what actually passed between the insolvent and the agent at the time the payment was made. Well, upon that point there is some discrepancy between the evidence of the insolvent and Marais. The insolvent says that Marais told him the money had been forwarded to Twentyman, and could not be undone; whereupon he (Horwitch) said: "Well, as the thing has been done, it cannot be helped, and I must be satisfied." Well, I believe the statement made by Mr. Marais, and that the evidence of the insolvent is not entirely trustworthy. We find, for instance, that his evidence is quite in conflict with that of Mr. Parker, the manager of Marsh & Sons' business. According to the insolvent, it was with the greatest reluctance he allowed Parker to get possession of the promissory note for £50; that in fact he tried to keep it, but that Parker took hold of it, and kept it. Mr. Parker says quite the reverse, and throughout this matter I think Mr. Parker has acted in a perfectly honest and straightforward manner, a fact which makes one regret that Marsh & Sons should be amongst the creditors who are suffering by the payment to Twentyman & Co. Well, doubt being cast on the evidence of the insolvent as to what took place between him and Parker, it leads the Court also to discredit to a great extent his evidence where it is in conflict with that of Marais. I am quite satisfied that the payment was purely voluntary. But supposing Marais had paid over the full amount to the insolvent, and after doing so had said, "I have a bill for collection, will you pay it?" and the insolvent had said, "I will pay it, here is the money," could the transaction have been called in question? The bill was overdue, and was sent by the defendants to a country agent for collection, and the agent, seeing an opportunity of getting the money from the insolvent, asks him for the money, and gets it. Well, in my opinion, it makes no difference that the money was not first paid over to the insolvent instead of being deducted and remitted to the defendants. In my opinion it was as honest and *bona fide* a transaction as if the money had actually been paid to the insolvent, and by him handed back to Marais, to be transmitted to his principals in

Cape Town. Of course, it is often very difficult in these cases to say whether a transaction is in the ordinary and usual course of business. Only a few days ago we had an illustration of a transaction which was not in the ordinary course of business. In that case* a person purchased certain carts and within a month afterwards sold them for considerably less than they had cost, and out of the proceeds paid his brother-in-law an amount which he owed him. But that case is very different from the present. There is nothing in the correspondence to show that there was any collusion. The defendants employ a country agent to collect this money for them. It is to their benefit that this agent is also an auctioneer, that gives them a great advantage, but their using that advantage I think ought not to prejudice them. They were vigilant creditors who kept their eyes open and used such means as the law allowed them to obtain payment of money justly due to them. I put the question whether Messrs. Twentyman's merchandise had been utilised in the purchase of the same sheep and goats which were subsequently sold, and I think it has some bearing on the case as showing *bona-fides*, and that Twentymans were getting back from the insolvent only the proceeds of what had been obtained from them. One cannot help feeling some sympathy for the other creditors, but we cannot lose sight of the fact that there is a growing tendency to give indiscriminate credit to any stranger who arrives on our shores. A Russian or a Pole comes here with hardly a rag on his back, and within twelve months afterwards receives unlimited credit from every merchant in the place. If they choose to do that, they must bear the consequences if the person to whom credit is given does not answer their expectations. Under all the circumstances in this case, we are of opinion that the payment was not an undue preference in the terms of the 84th section inasmuch as it is protected by the 86th section, and that judgment must be given for the defendants with costs.

Mr. Justice Upington: I am fully of the same opinion, and I endorse very strongly what his lordship has said with regard to the indiscriminate granting of credit by merchants in this country.

[Plaintiff's Attorneys, Messrs. Findlay & Tait: Defendants' Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

* *Van der Westhuizen's Trustee v. Steyn*, *supra* page 313.

GENERAL MOTIONS.

IN THE INSOLVENT ESTATE OF ALEXANDER JACOBUS.

Mr. Buchanan moved for an order authorising the Master of the Supreme Court to convene a special meeting of creditors of the said estate for the proof of debts and election of a trustee, the trustee at the second meeting having declined to accept the office.

The order was granted.

LYNCH V. COLONIAL GOVERNMENT.

Mr. Benjamin moved for a rule *nisi* requiring the respondents to show cause why petitioner shall not be permitted to sue *in forma pauperis* in an action for the recovery of damages by reason of injuries sustained by petitioner through the negligence of respondents' servants while in charge of a railway engine.

The order was granted.

HEUGH'S TRUSTEE V. HEYDENRYCH. } 1895.
Aug. 23rd.

Lessor and lessee—Tacit hypothecation—
Movables of a third person.

The owner of furniture let it to the lessee of certain premises, who afterwards removed it to other premises without the knowledge or consent of such owner.

Held that, although the lessor of the new premises had no notice that the furniture did not belong to the lessee, he had no tacit hypothecation over the furniture.

This was an application on notice to the respondent that he would be required to show cause why the objection lodged by him on the 3rd July, 1895, against the confirmation of the liquidation and distribution account in the insolvent estate of Sophia Christina Heugh framed by the applicant should not be expunged, why the account should not be confirmed, and why the respondent should not pay the costs of the application.

The respondent in his affidavit alleged:

(1) That on or about the 1st August, 1894, he let to the insolvent certain household furniture, under a written contract of lease, the original of which was filed with the papers in insolvency.

2. That at the time aforesaid the insolvent intended to take over and commence a boarding-house in Wale-street, which property belonged to Mrs. Dugald Rose,

3. That the said Sophia Christina Heugh took possession of the said house and of deponent's furniture and continued to pay to deponent the rent of the furniture up to the 1st December 1894.

4. That some time previous to the 1st December, 1894, the said Sophia Christina Heugh removed deponent's furniture from the premises aforesaid, clandestinely and without his knowledge or consent, and in violation of the said agreement.

5. That some time in the month of December the said Sophia Christina Heugh informed deponent that she had removed, whereupon he remonstrated with her and informed her that she should have given him written notice thereof, so that he could inform her landlord that the furniture was his (deponent's) property, whereupon she stated that she had already done so.

6. That not long thereafter deponent ascertained that the said Sophia Christina Heugh had been sued in the Resident Magistrate's Court for rent, whereupon deponent gave notice to the messenger of the said Court that the furniture belonged to respondent.

6. Before further action was taken the said Sophia Christina Heugh gave notice in the "Gazette" of her intention to surrender her estate, and the estate was accepted as insolvent on the 2nd February, 1895, although deponent had lodged a *caveat* against the surrender.

7. That the said Sophia Christina Heugh, when examined before the Master, stated on oath, as follows: "I did not get Mr. Heydenrych's permission to remove the furniture from Wale-street, I did not tell Mr. Falconer, to whom the furniture belonged, that is not when I took the house, but I told him afterwards," reference being had to the examination filed with the Master will show.

8. Deponent has ascertained that the premises into which the said insolvent moved belonged to one Robert A. Falconer, and that during the period of her occupancy one Hugh McLachlan purchased the house from the said Falconer, and that the insolvent was a monthly tenant of said premises.

9. That deponent has proved in the said estate for three months' rent of the furniture, £12 10s., namely, rent from 1st December, 1894 to 28th February, 1895, and deponent claimed the furniture so leased, from the trustee above named, who after investigating the matter, reported to creditors at the third meeting as follows: "It is clear from the information obtained and the documents produced that Mr. Heydenrych has established his rights to the furniture &c. (reference being made to the

report will more fully appear). That the said report was adopted at said meeting whereat the said Falconer was represented.

10. The deponent for his own benefit and in the interest of the estate arranged with the said George William Steytler (the applicant) to have his furniture sold at the sale of the other furniture and assets in the estate, with the distinct understanding that the said Steytler was not to part with the proceeds of deponent's furniture.

11. That deponent personally attended and arranged his furniture on the morning of the sale and during the sale kept a record of the sale price of every article belonging to him and after the conclusion of the sale compared his account with the auctioneer's vendu roll, and subsequently gave the said Steytler a copy (of the list marked A annexed hereto), which shows that deponent's furniture realised £68 18s. 3d.

12. That after deducting a *pro rata* share of the expenses in connection with the sale there is due to deponent a sum of £62 10s. 5d.

13. That the said trustee has wrongfully and improperly brought up the proceeds of deponent's furniture in the distribution account and has moreover wrongfully and improperly applied the said proceeds towards payment of the rent of the said Robert A. Falconer and Hugh McLachlan, as well as towards payment of a claim of one Kirkman, who had let certain furniture to the insolvent which did not realise sufficient to pay the claim of Kirkman in full.

14. That several articles of furniture both belonging to deponent and the said Kirkman were wanting on the morning of the sale.

15. That on the 2nd July last deponent lodged an objection to the account framed and filed by the trustee as deponent contends that his furniture never formed part of the assets of the said estate, and as the trustee never disputed deponent's right thereto. On the contrary the trustee told deponent that the said Falconer would have to proceed against deponent should he wish to recover the proceeds of deponent's furniture, which claim deponent was prepared to resist; but it seems the said trustee paid the said Falconer and McLachlan as far back as the 21st May, 1895, and long before he framed his account, as the receipts and account will show.

16. Deponent further saith that he believed the said Falconer and McLachlan must have known, even if the insolvent did not inform them, that the furniture was not her own property as she was only a boarding-house keeper, and a new arrival here and quite unknown in this town, and they have admitted

that they had notice from the said Kirkman that part of the furniture belonged to him on the purchase hire system.

17. Deponent further says that he believes the trustee is the nominal applicant in this matter, as the attorneys for the said Falconer now act as attorneys for the trustee, and that the said Falconer and McLachlan have guaranteed the applicant's costs, as the receipt or indemnity bond proves.

18. Deponent lastly says that on Friday the 9th August, 1895, and before he had been served with the notice in this application, he gave his attorney, Mr. De Villiers, instructions to give the trustee and parties interested notice why the plan of distribution should not be altered or amended, but before such notice could be served deponent was served as before stated.

The landlord in his affidavit alleged that he was not aware at any time (during the tenancy) that the furniture was the property of the respondent, but believed that it belonged to the insolvent.

Mr. Rose-Innes, Q.C., was heard in support of the application and relied on *Ulrich v. Ulrich's Trustees* (2 Juta, 319) and *Lazarus v. Doze* (3 Juta, 42).

Mr. Graham for the respondent.

The Court refused the application with costs.

DeVilliers, C.J.: It is always a prudent course for a person who lets movables to the lessee of land to give notice to the landlord that the movables do not belong to the lessee. By taking this course he prevents the landlord from being deceived by the tenant's apparent ownership and protects his own property against attachment for the landlord's tacit hypothecation for rent. If he omits to give such notice it would not require much further evidence to justify a Court in holding that he impliedly consented to the movables being subjected to the landlord's lien. For instance, if he has reason to know that the landlord continued to let the premises to the lessee in the belief that he was the owner of the movables, the silence of the true owner might reasonably be construed into such a consent. But without some evidence from which such consent can be implied the landlord acquires no rights over the movables of a third person except, of course, in those special cases in which his rights attach without such consent expressed or implied. In the present case the furniture was let by the respondent to the insolvent while she occupied one house and was removed by her to new premises without the respondent's knowledge or consent. It is impossible, therefore, to hold that he is responsible for the belief of the landlord of the new premises that the furniture belonged to

the insolvent. Being unaware of the removal he could not give notice of his ownership to the new landlord. Under these circumstances I am of opinion that the respondent's objection to the liquidation account which awards to the landlord the proceeds of the furniture was a good one, and that the trustee's application to expunge the objection must be refused with costs.

Mr. Justice Upington concurred.

[Applicant's Attorneys, Messrs. Sauer & Standen: Respondent's Attorney, C. C. de Villiers.]

ERENTZEN V. DEVLIN. } 1895.
 } Aug. 23rd.

Rent—Evidence—Question of fact.

Magistrate's judgment reversed on a question of fact where the weight of evidence was against the Magistrate's finding

This was an appeal from a decision of the Resident Magistrate of Port Elizabeth, in an action in which the present respondent, plaintiff in the Court below, sued the appellant (defendant) for £2 10s., rent alleged to be due, and for ejectment.

The defendant admitted the debt but pleaded a tender of the amount on the due date, viz., 8th June, 1895, and again tendered the amount in court.

The plaintiff admitted the tender on the 8th June, but alleged that this was after the issue of summons and after the rent became due.

The plaintiff in his evidence deposed that he let the premises to the defendant on 6th May, 1895, at £2 10s. per month. That on the 7th June he went to the defendant for the month's rent. The defendant was ill in bed, and on being asked for the rent said that he had not got it, but that he would get up and endeavour to obtain the amount, and that if he could not pay all he would pay part of the rent on account. He further expressed his intention of removing his furniture, whereupon the plaintiff told him to clear out, and afterwards applied for and obtained an attachment order.

That subsequently the defendant denied that the rent was due until the 8th June.

The defendant's case was that he hired the house from the 8th May, in this he was corroborated by his wife, and that on the 8th June, before the summons was issued, he tendered the rent to the plaintiff. He further stated that the plaintiff first demanded the rent at the end of May.

He denied that he had ever expressed the intention of removing his furniture from the house.

The Magistrate gave judgment for the plaintiff for the amount claimed, and ordered the defendant to give up the premises by the 14th June with costs, excepting the costs of the attachment which the plaintiff was ordered to pay.

From this judgment the defendant now appealed.

Mr. Juta, Q.C., for the appellant.

The Court sustained the appeal.

The Chief Justice said: The Court is loth to disturb a magistrate's judgment upon a question of fact, but really in this case no alternative is left to the Court. The plaintiff himself seems to have been in doubt as to when the rent began, because he first sent in his account claiming rent to the end of May, 1895, and then afterwards altered this into an account for rent from the 7th May to 7th June, 1895. The defendant is called and swears positively that it was agreed, on the evening of the 7th May, that the rent was to run from the 8th May, and in this he is supported by his wife, who gives positive evidence to the same effect. Now on the one hand we have the positive evidence of these two—the defendant and his wife; and on the other hand a statement made by the plaintiff, which is quite in conflict with his own previous account which he rendered to the defendant. And we cannot lose sight of the fact that the Magistrate himself, on one important point, disbelieved the plaintiff, because he refused to allow the costs for the extraordinary process of the attachment of the defendant's property for rent. Under these circumstances, I confess that I am surprised that the Magistrate should have given judgment for the plaintiff for £2 10s. with costs. He would have been quite right in giving judgment for £2 10s., but as that amount was tendered at the proper time, namely the 8th June, the plaintiff should have been ordered to pay the costs. Then as to the order to give up possession of the premises, it follows, from what I have said, that the order was entirely wrong. The defendant has been by no means in default, and it was the duty of the landlord to have given one month's notice to the defendant; but without any notice, on the 7th June, while the defendant is lying ill in bed, the landlord threatens to turn him out of the house and follows up his threat by bringing this action. In my opinion, both law and equity are entirely in favour of the defendant below, and judgment must now be altered to one for the plaintiff for £2 10s., but the costs must be paid by him.

[Appellant's Attorney, G. Montgomery Walker.]

MARTELL AND CO. V. PAARL { 1895.
BERG WINE CO. { Aug. 26th.
Trade mark—Infringement of—Fancy design—Label.

A label with a fancy design in blue and silver having been registered as the trade mark of the manufacturers of brandy, the respondents used upon their bottles of brandy a label with exactly the same design and with the words "Cognac" and "Old Brandy" in exactly the same places as on the registered label, so that at a distance of four or five yards no difference was discernible.

Held that, although neither the applicants' name nor the sign of a bird on a shield was appropriated, the close similarity was calculated to deceive the ultimate consumers, and that the imitation constituted an infringement of the trade mark.

Interdict granted, but its operation suspended for three months.

This was an application on notice to the respondents that they would be required to show cause :

(a) Why they should not be interdicted from selling or exposing for sale any Cognac brandy, or liquor bearing thereon, or from in any way using, a certain label more fully described in the annexed affidavit, and which is an infringement of the trade mark rights of the applicants, being a colourable imitation of their trade mark, and so nearly resembling the same as to be calculated to deceive.

(b) Why they should not be ordered to pay the costs of the application.

The facts as deposed to in the affidavit are as follow :

The applicants are the proprietors of a certain trade mark, registered for many years in England and elsewhere, and registered in this colony on 18th July, 1892, and again with slight alteration in the letterpress on 3rd July, 1895.

The applicants' local attorneys received instructions to watch the applicants' trade mark rights, as it was understood that colourable imitations of their trade mark were being used by wine merchants in this colony.

Inquiries were immediately instituted, and it was ascertained that several wine merchants and dealers were making use of labels which were colourable imitations of the applicants' trade

mark. On being remonstrated with, they gave assurances in writing that the use of the label objected to would be discontinued, and all existing specimens destroyed wherever possible.

Hearing that the respondent company was selling brandy in bottles bearing labels more objectionable even than those previously prohibited, the applicants' attorneys despatched a messenger to the respondents' branch store at Mowbray on July 12 last, and he purchased a bottle of brandy bearing the label annexed.

The respondents were then informed that proceedings would be taken against them.

On 6th August another bottle with a similar label was purchased at the Mowbray branch store, and it was alleged that similar sales were still being made there and elsewhere. The applicants' attorneys alleged that the respondents' label was almost a facsimile of the applicants' trade mark, excepting that the respondent company's name appeared in place of the applicants' name. That it required a careful inspection to distinguish one label from the other even when side by side, and that none of the labels, now suppressed, and previously referred to, resembled Martell's mark so closely as did the respondents' label.

It was further alleged that the applicants have and are suffering damage in consequence of the use by the respondents of the label above referred to, and that unless they be interdicted, the applicants would be greatly prejudiced.

That communication had been made to England for instructions as to whether or not damages were to be claimed from the respondent company, but that in any event it was very important that the respondents should be interdicted in terms of the notice of motion.

The following is a full description of the applicants' trade mark as registered : A rectangular label, printed in blue and silver on a white ground. At the top is a shield bearing three hammers, and surrounded by a perching bird, above the shield and bird being the words, "Trade mark on capsules and cases." Below the shield and bird are two blue bands bearing the words "J. & F. Martell" and "Cognac" respectively, in white letters, and passing under the shield and bird is a third blue band bearing the words "Old Brandy," in white letters. The rest of the label is filled with fancy designs in blue and silver.

The respondents' label, which is not registered, differs from the applicants' in the following particulars : (1) At the top there is no shield bearing three hammers surrounded by a perching bird, but instead of this device appears a horseshoe suspended from a bow of ribbon ; (2)

the words "trade mark on capsules and cases" do not appear; (3) nor do the words "J. & F. Martell," the name on the respondents' label being "Paarl Berg Wine, Brandy, and Spirit Company."

The word "Cognac" above three silver stars on a small crescent-shaped label on a blue and silver ground and the words "Old Brandy" were common to both labels.

All the fancy designs and work on the applicants' label appeared on the respondents'.

The capsules were however different, the applicants' being purple in colour, embossed in relief in white with the applicants' trade mark and the words "J. & F. Martell, Cognac," whereas the respondents' capsule was blue, impressed with the company's horse-shoe surrounded by the words, "Paarl Berg Wine, Brandy, and Spirit Company (Limited), Lady Grey Bridge."

For the respondent company it was alleged that the label objected to by the applicants had been used by the respondent company for several years, and that the same was widely as known the "Paarl Berg" label throughout the Colony, the Orange Free State, and the Transvaal.

That the design used by the respondent company on all their labels, including those not for brandy and printed on different colours, is a horseshoe suspended from a bow of ribbon, and has been used by the company for many years, and is well known in the Colony, the Orange Free State, and Natal.

That the retail price of the company's brandy is 2s. per bottle, whereas that of the applicants' is 7s. or 7s. 6d., and that no purchaser could be deceived, so great was the difference in price.

Mr. Rose-Innes, Q.C., for the applicants.

Mr. Graham for the respondents.

The interdict was granted with costs.

De Villiers, C.J.: It is impossible to lay down any general rule as to what degree of imitation would constitute an infringement of a trade mark. If a label of any class of articles is used which bears such a close resemblance to a registered label that the public may reasonably be expected to purchase those articles in the belief that they were manufactured by the owner of the registered label there certainly is an infringement of his trade mark. By the public I mean not only the original purchasers but also the ultimate consumers of the articles. Where the resemblance is not obvious it may be necessary to prove that persons have in fact been deceived, but where, on a comparison of the labels, the similarity is found to be so close as to be necessarily calculated to deceive, it would be mere waste of time to require further evidence. In the present case we have the two

bottles before us, one bearing the label of the applicants and the other that of the respondents. At the distance of four or five yards it is quite impossible to discern any difference between them, but looked at more closely a difference is perceptible. The sign of a bird on a shield has not been taken over. Of course, the applicants' name could not, with any chance of impunity, be appropriated, but for the rest there is no difference between the two labels. The fancy design in blue and silver is exactly similar to that of the applicants' registered label, and every minute detail has been imitated as closely as it could possibly be done. The word "Cognac" is there and so are the words "Old Brandy" in exactly the same places as these words occupy on the original label. Surely retail consumers, if not the purchasers of the filled bottles, may reasonably be expected to be deceived by the resemblance. The object must have been to lead unwary purchasers to suppose that they were buying the applicants' brandy, but even if this was not the object of the respondents it must be the result of what they have done. The interdict will be granted with costs, but under all the circumstances the Court is of opinion that its operation should be suspended for three months so as to enable the respondents to dispose of their stock of bottles already labelled and obtain a supply of different labels.

[Applicants' Attorneys, Messrs. Scanlen & Syfret; Respondents' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

PRIEM V. WINTER. { 1895.
Aug. 26th.

Sale of land—Purchaser's mistake—Interdict—Reasonable tender.

Where a purchaser bought one lot of ground, No. 77, and shortly afterwards proceeded to build a house on the adjoining lot, No. 76, under the erroneous impression that lot 76 was the one which he had purchased, and on discovering the mistake applied to the Court for an interdict restraining the seller from disposing of lot 76, the Court refused the application on the grounds inter alia that it was unnecessary, as the seller had made a reasonable offer to transfer lot 76 to the purchaser, against transfer of lot 77, on the latter's paying all expenses.

This was an application on notice to the respondent that a temporary interdict would be

applied for restraining him from passing transfer of certain lots of grounds near the Salt River Station and especially lot 76, and that he would be called upon to pay the costs of the application. In support of the application the applicant alleged that on 22nd October, 1894, he purchased from the respondent, through his agent, one Paterson, a certain lot of ground pointed out to him by Paterson.

That thereafter on 2nd November the respondent passed transfer to him of lot 77, of the ground lots 72, 73, 76 and 77, as per deed of transfer dated 2nd November, 1894.

The applicant built a house on the lot pointed out to him, but only recently discovered that lot 77 was transferred to him, whereas the lot pointed out and upon which the house had been built was lot 76, which adjoins lot 77.

That the applicant immediately caused a letter to be written to the respondent requesting him to transfer the lot on which the house had been built, but the respondent failed to comply with the request.

That it was the intention of the respondent to dispose of all the lots Nos. 72, 73, 76 and 77, or such as he has not already sold and transferred, and that unless he were restrained further complications would arise, and that unless the application were granted, the respondent might transfer lot 76 to some other person.

The respondent alleged that he never pointed out lot 77 to the applicant, nor did he instruct Paterson to do so, that the applicant selected lot 77 on the diagram of the four lots in the office of his (respondent's) attorney and that he employed his own surveyor.

That when he (respondent) discovered that the applicant had encroached on his ground, he made two proposals to the mortgagee, with the object of avoiding disputes :

1st. Either to sell the lot 76 to the applicant for £55, or

2nd. To give him transfer of lot 76 against transfer of lot 77, he paying the costs to be incurred.

That the mortgagee promised to convey his suggestions to the applicant but that he (respondent) had not since heard from him. The respondent denied that he had any intention of selling lot 76 to any other person, and renewed the offer made to the mortgagee.

In view of the above the respondent alleged that he considered the applicant's claim, that he should pay the expenses, unreasonable, and that he was not prepared to comply with the same, unless ordered to do so by the Court.

Mr. Clegg for the applicant.

Mr. Juta, Q.C., for the respondent.

The application was refused with costs.

The Chief Justice said : In my opinion this application should never have been made. It is said that the applicant is a poor man, but that is a greater reason for not rushing to law when a reasonable offer was made by the respondent. The offer was to transfer lot 76 to the applicant for £55, or to give him transfer of lot 76, against transfer of lot 77, he paying the costs that had been incurred. Well, the real point in the case is, who is to pay the costs? The respondent is willing to transfer lot 76; he says a mistake has been made, and that he will be a party to the rectification of the mistake, and give transfer of the lot bought by the applicant, 76, and that the applicant must give him transfer of lot 77 in exchange. Who is to pay the costs? In my opinion the costs should be paid by the person who really is chiefly to blame for this mistake. The respondent took no further action in the matter after he had sold the lot, the applicant was the one who actively did everything in order to get transfer, and if he had instructed the surveyor employed to take care to point out the particular lot he bought, and to take care that this lot appeared on the transfer, this mistake would not have occurred. Instead of that he, in a hurry, builds on the property before he has obtained transfer. He ought to have seen that proper transfer was given to him before building on the property. But the respondent seems quite willing to assist the applicant, and Mr. Juta says he is still willing to do what he offered. Under these circumstances this application ought to be refused. There has been no proof that the applicant at any time wished to transfer this lot 76 to anyone else. The application must be refused with costs, the respondent undertaking to abide by his offer to transfer lot 76 against lot 77, the expenses to be paid by the applicant. Costs are given against the applicant for the further reason that even if there had been no offer, there would still have been no necessity to make this application; there has been no proof whatever that the respondent intended to transfer the lot in question to anybody else.

[Applicant's Attorneys, Messrs. Reitz & Herold; Respondent's Attorney, G. Montgomery-Walker.]

SUPREME COURT.

[Before Sir HENRY DE VILLIERS, K.C.M.G.
(Chief Justice), and Mr. Justice UPINGTON,
K.C.M.G.]

DEMAs V. DEMAS. { 1895.
Aug. 26th.

This was an action for a decree of divorce, instituted by Maria Demas, against her husband Isaac, by reason of his adultery.

Mr. Buchanan for the plaintiff.

The defendant did not appear.

Mr. Norman Lacy gave formal evidence of the marriage, which took place on the 7th August, 1874.

Maria Demas, a coloured woman, deposed that she was married at Worcester and they lived together until 1882, when her husband went to Kimberley. She afterwards heard that he was living with another woman, and he refused to return to her. She asked for the custody of her minor children, two daughters and a son.

Carl Demas, son of the plaintiff and defendant, deposed that he was with his father at Kimberley, who lived with a coloured woman there named Dinah Dersen.

The Court granted a decree of divorce, with costs, plaintiff to have the custody of the minor children of the marriage.

SUPREME COURT.

[Before Sir HENRY DE VILLIERS, K.C.M.G.
(Chief Justice), and Mr. Justice UPINGTON,
K.C.M.G.]

VAN RENAN V. VAN RENAN. { 1895.
Aug. 29th.

This was an action instituted by J. B. van Renan against his wife for restitution of conjugal rights, failing which for divorce.

The declaration alleged that the parties were married in February, 1884, and that the desertion took place in May, 1893.

Mr. Juta, Q.C., for the plaintiff.

Mr. Norman Lacy, clerk in the Colonial Office, produced the register of the marriage between the parties, which took place in 1884.

John B. van Renan, the plaintiff, deposed that his wife at present lived at Constantia. In 1889 the estrangement between them com-

menced, and she left him in 1893. Between 1890 and 1893 they did not live happily together. When she went away, he thought she would come back and sent her money regularly, but she subsequently refused to come back. In December last he came to Constantia and endeavoured to induce her to return to him, but she declined, and she had ignored all his advances since. There had been one child of the marriage, which died.

By the Court: He did not know why his wife left him. She gave no reason and he never asked her. He always treated her very kindly. He had not kept her letters.

The decree was granted.

The Chief Justice said: It is remarkable that the defendant should have left the plaintiff and never told him, at any time, the reason, either by word of mouth or by letter. However, the evidence which has been given to-day by the plaintiff will no doubt come to the knowledge of the defendant, and it will be still competent for her, on the return day of the rule *nisi*, to appear and show cause then why a decree of divorce should not be granted. For the present there are sufficient grounds for granting a decree of restitution of conjugal rights. The defendant must be ordered to return to the plaintiff on or before the 15th October, failing which the Court will grant a decree *nisi* calling on the defendant to show cause on the 1st November why a decree of divorce should not be granted.

Mr. Justice Upington: If the defendant should show reasonable grounds, I should have very great reluctance in assenting to a decree of divorce.

[Plaintiff's Attorneys, Messrs. Findlay and Tait.]

LANKESTER V. MORRIS. { 1895.
Aug. 28th.

Principal and agent—Donation exceeding £500—Non-registration.

Where an agent had been employed by his principal to realise an estate, and had deducted from moneys received by him on account of his principal the sum of £600, alleged to have been given by the principal as a donation to the agent's wife, the Court set aside the transaction on the grounds inter alia of non-registration, and that in the absence of a deed of donation, there was no clear indication of the donor's intention.

This was an action instituted by Mrs. Ann Lankester to compel the defendant, Walter Morris, to refund the sum of £60,

The declaration alleged that the plaintiff was the widow of the late George Lankester, who died in 1884, and who by his will appointed the plaintiff and George Wm. Robert Lankester his executors testamentary, and that letters of administration were duly issued to them on 30th September, 1884.

That under the will of George Lankester the plaintiff was entitled to one half-share and a child's portion of the estate of her husband.

That thereafter on or about the 28th day of July, 1894, the plaintiff gave a power of attorney to the defendant to act on her behalf, in conjunction with her co-executor, in all matters concerning the realisation of the estate of the late George Lankester, and to collect and receive on her behalf all moneys due to her from the said estate for the purpose of paying out the said moneys to the said plaintiff.

That the defendant, acting under the said power of attorney and in conjunction with the co-executor, thereafter proceeded to realise the said estate, and received for and on account of the plaintiff the sum of £1,498 11s. 5d. which it thereupon became the duty of the defendant to hand over to the plaintiff. That thereafter the defendant paid over to and accounted to the plaintiff for the sum of £898 11s. 5d., leaving a balance of £600 still due and owing by the defendant to the plaintiff.

The plaintiff claimed:

(a) Judgment for the sum of £600, with interest thereon from the 22nd June, 1895 (the date of the liquidation account).

(b) Alternative relief and costs.

The defendant in his plea admitted the appointment of executors, the amount of the plaintiff's share, and the receipt by him of the sum of £1,498 11s. 5d., but he said that he had accounted to the plaintiff for the amount.

He specially said that in November, 1894, the plaintiff of her own free will, and out of the natural love and affection which she bore to his wife, her sister, agreed to give the defendant's wife the sum of £600, and that she, the plaintiff, gave an acknowledgment in writing thereof.

That thereafter on 1st July, 1895, the defendant, at the plaintiff's request, deducted the sum of £600 from the £1,498 and paid it to his wife in satisfaction of the said donation, and that the plaintiff received back the said acknowledgment in writing and gave a receipt, which was annexed to the plea. (In this receipt the acknowledgment in writing referred to was brought as an I O U for £600, dated 29th June, 1895. *Rep.*)

That the plaintiff destroyed the said acknowledgment, and that thereafter in consequence of the plaintiff's son, one Henry Lankester, raising

objections to the donation, the plaintiff signed another acknowledgment on or about 4th July, and that the said acknowledgment was handed to Mrs. Morris in the place of the one destroyed.

The defendant finally said that he had duly accounted for all moneys received by him on behalf of the plaintiff, and admitted his refusal to pay the amount claimed.

The plaintiff, in her replication, admitted the signing of the receipt, but she said that at the time she signed it the defendant falsely represented to her that it was a true and correct account of his lawful dealings with her money.

She said that she had no knowledge of the I O U. that she signed many documents at the request of the defendant, none however knowing them to be I O U's, and that she never authorised the defendant to pay over the £600 to anyone.

She denied all the allegations in the plea.

The rejoinder was general, and on these pleadings issue was joined.

Mr. Graham and Mr. Close for the plaintiff.

Mr. Watermeyer for the defendant.

Mrs. Ann Lankester deposed that she was sixty years of age and the widow of the late George Lankester, who died in 1884. He was a butcher in Simon's Town. She was appointed one of the executors of his estate, together with her stepson, George William Robert Lankester. She was married in community of property with her husband. Nothing was done with the estate until 1894, George Lankester managing the butchery business, and looking after it in the meantime. She had two sons and two daughters of her own. In 1894 she determined to wind up the estate, and gave a power of attorney (produced) to Mr. Morris, who lived at Rosebank. Morris was her sister's husband. She was staying at Mr. Morris's when she signed the power. At that time she was rather dissatisfied with the way her stepson, George Lankester, was dealing with the estate, and the power authorised Mr. Morris to call upon him to render an account. She, at that time, had every confidence in Mr. Morris. She paid for her board and everything while staying at his house. In the beginning of last month (July) Mr. Morris came to her in Simon's Town, and at his request she signed the document (produced). He said it was a settlement of her account. Her son Robbie, who worked at the Dockyard, came home the same evening, and in consequence of a conversation she had with him about the document, which was lying on the table, she wrote to Mr. Morris (on the 3rd July), asking him to call at once on a matter of importance. He replied on the 4th July, but did not mention that he would call. He, however, came down. She and

Robbie and Morris then had a conversation, but Morris first of all asked her to sign a document, which she did. She asked him about the account, and Morris said to Robbie, "Do you think I would humbug your mother? If I wished to do so I could have robbed her of the whole or the half of the property." That was in reply to Robbie's question about the item in the account of £600 stated to have been given by her to Mrs. Morris. Mr. Morris never at any time showed her an I O U. Morris gave her £38, and said that the other money was banked. She trusted to his honesty. It was not until Robbie pointed out that she knew that Morris had taken £600 for his wife, and showed it in the account that she began to doubt the defendant's *bona fides*. When she signed the account she knew nothing of it. She signed many papers for Morris, and did not know what she signed. He said nothing to her about having an I O U of hers for £600 in his possession. As far as she knew she never gave such an I O U. Until she was told by her son Henry, she did not know what the meaning of an I O U was. She was totally ignorant of business matters. She never promised to give her sister (Mrs. Morris) £600 or any sum out of love and affection.

Cross-examined: From 1884 to 1894 her step-son George managed the butchery business and kept control of her whole estate. Mr. and Mrs. Morris came up from Kimberley in 1894, and at her request they called on her. She told them that she had not received any money from her husband's estate and that during the whole ten years which had elapsed since her husband's death she never received any money from George. She asked Morris to take charge of her affairs. She did not ask her son Henry to do it. Mr. Morris consented to act, and at her request, consulted Mr. Silberbauer, her solicitor. She never promised Mrs. Morris money, nor told the Morris's all her troubles and that she was unhappy with her children. She could not deny that the three documents handed to witness were signed by her, but she signed many documents and did not know the meaning of them; they were not read over to her. Mr. Morris bought her a house and furniture, and she occupied the house with her son Robert. She had made a will in which her son Henry was appointed an executor. She asked Mr. Morris to make a codicil giving something to her son Robbie, and he did so. In that she cancelled the appointment of Henry as executor and appointed Robbie. It was not because she did not trust Henry.

Robert Lankester, son of the last witness, and twenty-six years of age, said he had lived with

her since January last. He remembered seeing the account lying on the table and pointing out to his mother that an I O U for £600 was mentioned in it, and charged against her estate. Subsequently Morris, on being questioned about the I O U, said that he would not fool his mother in "black and white." His mother was very ignorant as to business matters, and was very much worried about her affairs.

Cross-examined by Mr. Watermeyer: His mother did not trust her sons. She used to carry her money about with her in order to secure it.

By the Court: He never knew of his mother giving an I O U to Morris for £600.

Henry Lankester, also a son of the plaintiff, deposed that it was at his instance that steps were taken last year to wind up the affairs of the estate. He accompanied her to Mr. Silberbauer's office, and they were showed I O U's of hers for £200 and £30, and his mother then declared that the signatures were not hers. He was quite certain that the I O U's were not for £600 or £75.

Re-examined: He knew nothing of his mother having torn up any I O U's.

Mr. C. C. Silberbauer deposed that he acted on behalf of the plaintiff, and wrote to defendant, who subsequently called on him, and said that £600 had been given by the plaintiff to his wife, and that he held her I O U for the amount. Afterwards the plaintiff and her son Henry were in his office, together with defendant. He (witness) asked defendant what he intended to do with the I O U's, in reply to which he said that his wife would hold them, and that the consideration was love and affection. He first saw the original document on the 7th August, at Mr. Trollip's office.

Cross-examined by Mr. Watermeyer: He never told the defendant that he could take the money claimed if he would give security, nor did he pat him on the back and say it would be all right.

By the Court: He thought the defendant could not pay back the money. The defendant had only two I O U's of the plaintiff's in his hand, and he said he had other documents of hers, but did not say what they were. The defendant never showed him any I O U for £600.

This closed the case for the plaintiff.

Walter Morris, the defendant, deposed that he was a painter and decorator residing at Rosebank. He was married to his wife under ante-nuptial contract. When they came from Kimberley to live at Rosebank last year he took over the affairs of the plaintiff at her urgent request. He did not wish to do so, but he at last as-

sented. She was not happy with her sons, and he had heard Henry use violent language to his mother. A power of attorney was then given to him as drawn up by Mr. Silberbauer, and up to last month, when the present action was commenced, he acted under it. He bought a house for plaintiff. On the 1st July he made out an account, and plaintiff signed it. In that an I O U for £600, which had been given to witness by the plaintiff, was charged against her. He explained to her at the time that he had taken the £600 for his wife. The plaintiff had promised this sum to his wife out of love and affection. He held other I O U's of plaintiff's, and he had intended to deduct the amount of those from further moneys which fell due to the plaintiff. He told her that all the money had been placed in the bank. On the plaintiff signing the account he returned the I O U for £600 to her. All the I O U's given by her were given by her free will and consent, and he had never asked for the money.

Cross-examined: His wife had put the £600 in the Post-office Savings Bank. It was paid into the bank within a day or two of his deducting it, and it was still there. He never mentioned to the sons anything about the I O U's given by the plaintiff to witness. It was purely a private affair between the two sisters. None of the family knew anything about it. He stated in the affidavit of discovery that the plaintiff, at his request, and because she had torn up the original I O U for £600, signed a fresh acknowledgment on July 4. The letter to the plaintiff (produced) was written by him, and dated the 4th July, but he was not sure when he wrote it. On July 4 or 5 he went to Simon's Town, and met the plaintiff and her son Robert. She had written to him to call, but he did not know what it was about. She said, "I didn't mean this," referring to the £600 being deducted. She said Robbie wanted him to explain what the I O U for £600 meant which was mentioned in the account. Witness told Robbie that he had given his mother back the I O U on the 1st, but it was not forthcoming, and he presumed she had destroyed it. He thereupon wrote out another I O U in her presence. She used the same ink and the same pen to sign it.

The Chief Justice: That is quite impossible. The two inks are quite different.

Witness: There was only one pen and one inkpot there.

The Chief Justice told the witness to be quite sure on the point. The ink was quite different.

Witness: I remember there were two ink-pots and two pens there.

Cross-examination continued: The plaintiff repeatedly said that she would give his (witness's) wife half what she got out of the estate. He had in his possession other I O U's of the plaintiff's. There was one for £30, but that was not stated in his affidavit, he supposed owing to an oversight. There might be other I O U's.

The Chief Justice: Evidently, because you have not had half the estate yet.

Cross-examination continued: He had taken £100 as commission for his services.

By the Court: The I O U for £600 was written and signed with the same ink.

Witness being pressed persisted in this statement.

Elizabeth Henrietta Morris, wife of the last witness and sister of the plaintiff, corroborated his evidence as to how he came to manage the plaintiff's business affairs. Subsequently the plaintiff stayed at witness's house at Rosebank. Plaintiff repeatedly promised to give witness something in return for kindness shown by herself and husband. She signed three or four I O U's, which she (witness) still retained. That for £600 was given back to the plaintiff in her presence. She paid witness the money of her own free will.

Cross-examined: The I O U for £600 was given to her by her husband on his return from a visit to the plaintiff, and when she received that amount her husband deposited it in the Savings Bank. The plaintiff wished to pay the £600 first, and the smaller I O U's had therefore not been brought forward. The plaintiff at one time wished to give all her estate to witness.

By the Chief Justice: The plaintiff had four children, two sons and two daughters. She was surprised at the plaintiff offering to give her everything and overlooking her children, of whom she always wrote affectionately.

James Morris deposed that he was a stepson of the defendant. The plaintiff, while staying at Rosebank, told witness that she wanted to give her sister (Mrs. Morris) something unknown to her sons, and asked if she could not do it by means of a good-for. Subsequently she told him that father (meaning the defendant) had made out a good-for, and that she could now rest better as she had repaid her sister for all her kindness.

Cross-examined: He knew nothing about the amount, but the plaintiff told her she had given certain "good-fors." About the 2nd or 3rd July Mrs. Morris told witness that she had got £600 from the plaintiff. He knew there was more to come. He heard from both his father and mother that they were to have about £1,000.

The Court did not call upon Mr. Graham.

Mr. Watermeyer addressed the Court for the defendant.

Judgment was given for the plaintiff with costs.

The Chief Justice said: The defendant was employed by the plaintiff, who was his sister-in-law, to assist her in the administration of her husband's estate. He performed those duties and for those duties he received ample remuneration. The sum of £100, it is proved, was paid to him for his services. It appears from the evidence that the plaintiff is an elderly lady, and that she had the utmost confidence in her brother-in-law, and I am willing to believe also that she may from time to time have promised the defendant's wife that she would make gifts to her. I see no reason for disbelieving the evidence of young Morris, that there were promises made from time to time that she would make gifts to her sister, and I am not prepared also to say that these I O U's were not given by the plaintiff to the defendant. Of course if the I O U's had been sued upon, it is quite clear that the defendant would not have had any cause of action upon them; as there was no consideration given for them. It could not have been the consideration of the defendant's acting for her, because in respect of that he had received the full remuneration to which he was entitled by law; so there was no consideration whatever for the I O U's, and the defendant could not have had any remedy with respect to them. Well, on the 1st July the defendant went to Simon's Town, and there had an interview with the plaintiff. By that time he had received a sum of upwards of £1,400 out of the estate, of which he paid £860 into the Savings Bank for the plaintiff and £600 into the Savings Bank for his wife, giving the plaintiff the sum of £38 in cash which remained. Now, it is said that on that occasion, if on no other, the donation was completed—and unless the donation was completed on the 1st July, it must be revocable up to the present time. Now, the Court has more than once laid down, and notably in the case of **Van Renen's Trustees v. Versfeld*, that a donation exceeding £500 should always be registered, and that it was very desirable, as giving a clear indication of the donor's intention, that a deed of donation should be drawn up by a notary. When the plaintiff's will was about to be made, the defendant sent for Mr. Silberbauer, and I think the proper course for him to have adopted when the alleged donation was made was to have sent for Mr. Silberbauer

or some other impartial person to witness that this lady was depriving herself and her children of so large a sum as £600, instead of which the thing was done between three persons, the defendant, his wife, and the plaintiff. The son even was not present. The defendant could have had the son present; he was in Simon's Town, but even he is excluded from this important interview at which this donation is alleged to have been made. Well, Mrs. Lankester, the plaintiff, says that she did not clearly understand upon that occasion that the £600 was to be deducted, and the defendant has himself to blame if the Court now casts the greatest doubt upon his evidence as to what took place. He says these things are done "under the rose"; that is what he told Mr. Silberbauer—that more things were done "under the rose" than even that attorney himself was aware of. Well, if people choose to do things "under the rose," as the defendant chose to do throughout the whole of this transaction, he cannot be surprised that transactions completed "under the rose" in this way are looked upon with the greatest suspicion when a Court of law has to scrutinise the whole transaction. When a fiduciary relationship of this kind exists between the principal and the agent, and more especially when the principal is an elderly lady like the plaintiff, who has the utmost confidence in the agent employed by her, it is the duty of the Court to scrutinise the whole transaction very closely, and not to admit any benefit derived by the agent unless he can pass through the ordeal with safety. In my opinion the defendant has not passed through this ordeal with any degree of success whatever. The evidence of Mrs. Lankester casts the greatest doubt on the accuracy of his statements—and proof lies on the defendant—and I am by no means satisfied that the plaintiff did understand that, under the account submitted to her, she was depriving herself and children of £600 in favour of her sister; and the defendant himself, in my opinion, must have had grave doubts about the transaction, because only three days afterwards, according to his own version, he got this lady to sign another I O U. Well, if the donation was completed, if the gift of £600 out and out had been made to the defendant's wife, what was the object of obtaining another I O U three days afterwards, in which the plaintiff admits that she owes the defendant £600? His explanation is most feeble on this point. First of all, in his plea, he gave one version, he stated that the reason why the fresh I O U was given was because Mrs. Lankester had torn up the previous one, but he now goes into the box, and there is

no evidence whatever about tearing up the previous I O U; but on the contrary we have his affidavit, sworn only a few days ago, in which he says: "I verily believe this document is still in the possession of Mrs. Lankester." Under these circumstances, how can we credit his statement? As to the document of £600, which he says was signed by Mrs. Lankester on the 4th July, at the same time that it was drawn up, that is utterly incredible, the ink is quite a different ink. Before his attention was called to the difference in the inks, he said that it was written with the same pen and the same ink, but afterwards, when he saw that something depended on it he said there were two pens and two inkpots. He remembered that afterwards. Of course it became very important to say that afterwards, when he saw what a bearing it had upon the case. But I am quite sure that if this document was signed on the 4th July, it was written by the defendant before he came to Simon's Town, and then signed with an entirely different ink by Mrs. Lankester. But supposing it was written by her, no action has been brought upon that document, and if there had been it is quite clear that Morris could not recover because there was no consideration. But the importance of the document exists in this—that the very fact that the defendant insisted upon getting this other document proves at all events that he all along doubted that any donation had been completed on the 1st July, as he now states. Under these circumstances, I am of opinion that there is no clear proof of the donation between the principal and agent to justify the Court in holding that the defendant is entitled to retain the £600, and judgment must be given for the plaintiff for that amount with costs.

Mr. Justice Upington: I, too, have no doubt whatever upon the subject.

Mr. Graham asked for plaintiff's expenses as a witness, and for an interdict restraining Mrs. Morris from parting with the money.

Mr. Watermeyer said he had no objection.

The Chief Justice said: Judgment will be given for the plaintiff with costs, and she will be allowed her expenses as a witness. The Court will grant an interdict restraining Mrs. Morris from parting with the £600 paid into the Savings Bank by the defendant, or any part thereof, pending a further order of the Court.

[Plaintiff's Attorney, C. C. Silberbauer; Defendant's Attorney, Gus Trollip.]

SUPREME COURT.

[Before Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

Theron v. Van Aarde and { 1895.
Another. { Aug. 29th.

Mr. Buchanan applied for provisional sentence on a promissory note for £256 8s. 3d.

Application granted.

HEUGH'S TRUSTEE v. FRY'S EXECUTRIX.

Mr. Close applied for extension of return day in this case. An order had been granted to sue by edictal citation, service by publication in a Berlin newspaper. The attorney sent the advertisement without a remittance, which was declined, and now the extension was asked that the money might be sent.

Extension granted to November 30.

HAND AND CO. v. DROOME AND ANOTHER.

Mr. Molteno applied for judgment under Rule No. 329, for £188 15s., balance of account for goods sold and delivered.

Judgment given for plaintiff.

Associated Boating Companies { 1895.
v. Baarsden. { Aug. 29th.
Re "THE LEIF."

Salvage—Derelict.

A ship, having been abandoned by the master and crew owing to her rudder being disabled, was rescued as she was nearing a rocky coast, whither she had drifted at the rate of about a mile an hour.

*The rescuers having done the work at some risk and with considerable skill,
Held, that they were entitled to salvage remuneration.*

Held further, that, although it may not have been absolutely necessary for the master and crew to abandon the ship, yet as they had in fact abandoned her under circumstances of some danger, she must be deemed to have been a derelict, that although the risk to the salvors was not great, they were entitled to be remunerated on a liberal scale, and that under the circumstances one-sixth of the value of the property saved was a fair amount.

This was an action for £2,500 salvage, instituted by the plaintiff companies against the master of the Norwegian barque *Leif*, who was sued as representing the owners of the barque and her cargo, and all concerned therein, and also against Karl Lithman & Co., who claim to represent specially the owners of the cargo.

The declaration alleged that on or about the 17th July, 1895, the barque, while on a voyage from Bangkok to the English Channel, laden with teak logs, sustained damage from perils of the sea and became unmanageable. She was in consequence abandoned by her master and crew in the neighbourhood of Cape St. Francis, and thereupon became and was derelict.

That the master and crew of the barque landed in the ship's boat at or near Cape St. Francis.

On the 12th July, 1895, the plaintiff companies, having received notification of the said occurrence, despatched their steam tug the *Sir Frederick* from Port Elizabeth, in order to save the said vessel and rescue the master and crew.

The *Sir Frederick*, having taken on board at Cape St. Francis the master and crew of the said barque, proceeded in search of the abandoned vessel, and discovered her on the 13th July, 1895, about forty miles west of Cape St. Francis, and about ninety miles from Port Elizabeth, and at a distance of about four miles from the shore.

The said barque when so discovered was unmanageable, owing to the loss of her rudder, and was in a position of imminent peril. A heavy swell at the time setting in towards the land.

The said barque was thereupon taken in tow by the *Sir Frederick*, and brought in to Port Elizabeth, where she now lies in safety, together with her cargo. The said service was performed by the servants of the plaintiffs on board the *Sir Frederick* with great difficulty and danger, both to themselves and the tug, owing to the weather encountered before arrival at Port Elizabeth, which was reached on the morning of the 14th July, 1895.

The *Sir Frederick* is a screw tug of 184 tons burthen, and of the value of £10,000. The *Leif* has a register of 455 tons, and a value in her damaged condition of £800. The cargo is valued at £5,250, and the freight due upon it at Port Elizabeth amounts to £1,456 or thereabouts.

There is due to the plaintiff companies by reason of the premises, for salvage work and labour and expense incurred, the sum of £2,500, which is a reasonable amount under the circumstances.

All things have happened, all conditions been fulfilled, and all times elapsed to entitle the

plaintiffs to be paid the said sum, yet the defendants, as representing the owners and all interested in the said ship and cargo, refuse to pay the said amount.

The plaintiffs claimed:

(a) Payment of the sum of £2,500 from the defendants, or either of them, as representing the owners, and all interested in the said ship and cargo.

(b) Alternative relief.

(c) Costs of suit.

The defendant Baardsen in his plea admitted the formal allegations in the declaration, but said that the joining of Lithman in the action was unnecessary for the decision of the matters in suit.

He denied that the barque was abandoned, and became and was derelict as alleged, or that the service referred to in the declaration was performed with great danger as alleged.

He said that the barque was temporarily abandoned on 12th July under the circumstances, and for the purposes more particularly set forth in the protest (copy of which was annexed) which was duly made by him upon his arrival in Port Elizabeth.

He admitted the tonnage and value of the *Sir Frederick* and the tonnage of the *Leif*, but he denied that the cargo was valued at £5,250, or that the freight due upon it at Port Elizabeth amounted to £1,456.

He alleged that he had, before the action was brought, tendered to pay the plaintiffs the sum of £500 in respect of the service rendered to ship, cargo, and all concerned therein, which, he said, was an adequate remuneration for such service.

He renewed the tender of £500, and subject to the same he prayed that the plaintiff's claim might be dismissed with costs.

Issue was joined on these pleadings.

Mr. Sheil appeared for the plaintiffs.

Mr. Schreiner, Q.C., A.G., and Mr. Juta, Q.C., for the defendant, the master of the barque.

Mr. Sheil, having applied for leave to amend the declaration by expunging from the record the name of the second defendant, Karl Lithman, which was granted, opened the case for the plaintiffs.

William Hurr, lighthouse-keeper at Cape St. Francis, deposed that on July 12 last he saw a couple of boats passing the lighthouse, one towing the other. They went round Cape St. Francis about 3.15 p.m., and he telegraphed the fact to Port Elizabeth. He had seen a barque at nine o'clock in the morning about twelve miles south-west of Cape St. Francis. The men in the boat landed at Krom Bay, about a mile inside the point and an hour's walk from the

lighthouse. The mate, the second mate, and two seamen came to the lighthouse about 2.30 next morning. He gave refreshments to the men, and then rode to where the boats had landed and saw the captain. He asked him why he had abandoned the ship, and the reply was because the rudder was broken. The captain said the ship was sound in every other respect, but the men wished him to leave her. He did not say anything about leaving the ship temporarily. The tugs from Port Elizabeth arrived about 1.30 on the morning of July 13, before the crew of the vessel came to the lighthouse. When he had spoken to the tugboat men the tugs went in search of the barque. He saw the tug again about the middle of the day, but the Leif was not in tow. He signalled to the tug that the captain and crew of the Leif were at the lighthouse, and the tug came and fetched them off. He told young Mr. Searle they would find the ship about thirty or forty miles along the coast to the west. There was a nasty swell rising at the time but no wind. He saw the lights of the tug Sir Frederick about 8.30 at night, when she was towing the barque back. When he saw the crew of the Leif in Krom Bay he saw they were all prepared for a camp-out, having sails for tents, cooking utensils, &c. When the Sir Frederick passed at night with the barque there was a heavy swell, and it was a dark, misty night. The barque must eventually have gone on shore if she had not been rescued.

Cross-examined by Mr. Schreiner, Q.C.: The barque had her upper sails set after the abandonment. There had not been bad weather on the day he first saw the Leif, nor on the two previous days. The captain told him the rudder was swinging to and fro and battering the ship, and an effort to rig up a jury rudder was fruitless. When he spoke to the captain he knew the tugs had arrived to look for the ship or the crew. He (witness) rather thought it was the crew. It would be dangerous for a ship to have the rudder knocking about the stern-post. The captain did not say that he had no experience on the coast. On the night of the 13th the weather was very bad, the wind was westerly.

Re-examined by Mr. Sheil: When the tug returned from the first fruitless search for the Leif the captain of the Leif did not appear distressed that the ship had not been found.

By the Chief Justice: The coast where the vessel would have struck was mostly rocky. There were little sandy bays, but the coast was very dangerous.

Mr. James Searle, managing director and superintendent of the Associated Boating Companies, Port Elizabeth, said he had formerly been

at sea. He was well acquainted with the coast in the neighbourhood of Algoa Bay—the set of the sea, the currents, and the prevailing winds. The telegram from Hurr on July 12 was sent to him, and he took an extra boat's crew and left in search of the ship with the tug Sir Frederick. The tug was specially imported for salvage purposes and towing. Her fires were continually kept up. He left the jetty between six and seven on the same evening that the telegram came, and went slowly ahead looking for the boats until he reached Cape St. Francis. He sent his son ashore in a whale-boat to get any further news. When the whale-boat returned he was told the position of the ship at sunset, and went in that direction. He heard that the crew had probably landed at Krom Bay. He returned next day to Cape St. Francis, having parted with the Garth tug during the night. The lighthouse was then signalling to the Garth—"The crew are here or hereabouts." He went in and sent a boat for the crew, taking them off at ten a.m. on July 13. When he knew what the ship was loaded with he knew she could not have sunk, and went to the west again, and found her between thirty and forty miles from Cape St. Francis at three p.m. The vessel was about four miles from shore. He went on board and noticed that her sails were set, and there was every indication that she had been abandoned. The sailors' pet birds had been let loose, their cage doors thrown open and wheat spread on the deck for them. He took a crew aboard and passed warps to the ship, furled sails and started the tug with the vessel in tow. The captain of the Leif, his daughter, and others went on board of the Leif. A few hours after they had found her the Leif would have been ashore, in his opinion. If the ship had gone ashore the cargo of teak could not have been landed in a merchantable condition, nor could it have been got through the bush to Port Elizabeth without great expense. He had tried getting a whale-boat down there some time ago, and they had had to cut a road for the wagon through the bush. Up to ten p.m. on the 13th the towing proceeded fairly well; then it commenced to blow and got very nasty from the W.S.W. About midnight it was blowing hard, making it difficult work for the tug. At times the jerk of the towlines would sometimes bring the vessel abeam of the tug. At two a.m. the weather moderated, and they anchored in Algoa Bay at five a.m. It was much easier and less dangerous to tow a vessel with a head wind, because the towline was always at an even strain. In this case with a following sea the towing was jerky. On two occasions in the night the Sir Frederick

was in imminent danger. The Gorch came up at midnight and was asked to stand by.

By the Chief Justice: Once the tow-lines were nearly foul of the propeller, and on another occasion, as the tug went across the bow of the ship, the tug was within a few fathoms of the ship's jibboom. He had asked the Gorch to stand by for fear of accidents happening.

By Mr. Sheil: The actual cost of the trip to rescue the Leif was £126. He stayed aboard the barque the whole time after finding her.

Cross-examined by Mr. Schreiner: The Sir Frederick was almost entirely used for salvage purposes. She was too expensive for ordinary bay work—lighter, towing, &c. She was 400 horse-power. On the second occasion they went to look for the ship, they took a more southerly course. Where they found the ship was ninety miles from Algoa Bay. They were towing her for more than ten hours he thought. The Sir Frederick could steam eleven knots an hour. As to the danger, he would say that at least twice, if he had been aboard the tug, he would have slipped the barque. It was a matter of risk to cut the tow-rope. When he took the captain aboard the tug, he told him he was going to look for the Leif, and had no objection to the captain going aboard if he did not interfere. He had a crew on the Sir Frederick of fifteen. They were paid at so much per day and double pay for night if nothing was found, but if the vessel was salvaged, they received a share of the salvage money. In the £126 actual expenses of the trip was included £40 for the hawser, which was so strained as to be now worthless, and £32 for coal. Last year he had towed a ship twenty miles from Cape Recife and asked the captain £300 and he paid it. He used the hawser of the Leif to join to his own for towing. He claimed £2,500 for the work because if he had not rescued the vessel she would have gone ashore, and the rescue was made under circumstances of danger to the tug.

By Mr. Justice Upington: The captain had taken all the ship's instruments when he left her.

By the Chief Justice: The united opinion of the ship's crew when they went aboard the tug was that the Leif would be ashore. The Sir Frederick was not insured. The insurance companies required so heavy a premium on a vessel engaged in so risky a work that the companies did not insure.

Captain Alfred Charles Harding, of the Sir Frederick, said he had been at sea for twenty-two years. He went with the vessel in search of the Leif. There were some difficulties in towing the Leif. It was almost impossible to keep ahead of the Leif. She sheered first to one side and

then to the other. Three or four times they were on their beam ends with the barque running up on their beam. Once he ran with a chopper to cut the tow-line, but could not get to it for the water on the deck, and more than once the tug was nearly foul of the jibboom of the ship. By going slow he could not tow easily, and he therefore told the engineer to "Shake her up,"—"Go ahead and break something." He wished that the tug and ship would part, that he might stand by till the weather moderated. When they got round Cape Recife, and with the wind abeam, it was easier to tow her.

Cross-examined: The difficulty of towing was increased because the ship had not a rudder. They were separated by ninety fathoms of line, but sometimes the heavy seas before which they were running rushed the Leif ahead of the tug. There was certainly risk of the tug going down. He would not tow a ship without a rudder for £5 a mile. There was no tariff of charge for towing.

By the Chief Justice: That was the first vessel without a rudder that he had towed, and he had never before been in such danger. There were no lights lit aboard the ship when they found her.

Captain Christopher H. Young, Harbour-master and Port Captain, Algoa Bay, said he had been a captain in the Castle Mail Packets Company. He first went to sea in 1856, and had been acquainted with the Cape coast since 1865. The coast west of Cape St. Francis was principally rock. The ship had drifted according to the positions shown on the chart 27 miles in the thirty hours from the point where she was first seen to the point where she was found. She would have been on shore, in his opinion, before daylight on the morning after being found if she had not been rescued. It was exceedingly probable that the statements of the ship sometimes running abeam of the tug during the towing were correct, and undoubtedly there was danger to the tug. He had not the slightest doubt that the Leif had been abandoned.

Correspondence was put in and the plaintiff's case was closed.

For the defence,

Captain Andrias Baardsen, master of the Leif, said his ship's register was 455 tons. When the rudder broke a spar was put out to steer her, but was found useless. The rudder began to swing and batter the sides, and they were afraid of the sternpost being broken. The crew desired to leave the ship at daylight on the 12th. They left at nine o'clock. He did not wish to leave, but the crew put it to him strongly, and he yielded. They rowed to the lighthouse, but somebody showed a red flag, and they thought it dan-

gerous and rowed to Krom Bay, landing at sunset. When the moon rose he sent men to the lighthouse, and they came back and told him tugs had come. He went on board the *Sir Frederick* afterwards, and they found the *Leif*, and he went aboard her without prejudice to the rights of the tug-owners. He went to bed at eight that night, and rose at twelve, and found a fresh, nice breeze, but not bad weather. There was no danger to the tug that he could see. It was his wish to get back to the ship as soon as he left her. He allowed nobody to take more than an extra suit of clothes, and left the ship just as she would be in harbour. The ship might be insured; he did not know. They had left the sails so that one would put her ahead and the other astern. He thought the vessel was drifting off shore when he left her.

Mr. Justice Upington: Was it not a frightful danger to other vessels to leave a ship like that — ?

The Chief Justice: Without lights !

Witness: It was daylight. We never thought about lights. We could not signal; there was not a breath of wind. After the tug was hitched on, the ship's gear was used in connection with the towing. He told Mr. Searle that he thought the ship was more to the south-west when they went to seek her.

Cross-examined by Mr. Sheil: At the time they left the ship the rudder was not flapping very hard. He abandoned the ship. He and the crew left it. He did not quite know what abandoned meant. He was not an Englishman, and did not understand the word well. Nobody would have stayed on the ship if a part of the crew had left. They could not say that a gale would not have sprung up in a couple of hours, and nobody would like to be aboard an unmanageable ship in a gale. Mr. Searle and Captain Harding had exaggerated the state of the weather while the *Leif* was in tow. The *Leif's* crew helped the tug's crew in the towing operations. The tug's crew were not sailors. He thought the ship was insured; he could not say for how much.

By the Chief Justice: The crew were not mutinous. He could not force them to stop when all the ten men were anxious to go. He did not try to find how many men would volunteer to stay with him. All the men wanted to go, and he was the only one of the officers who told them there was no danger. By the Norwegian law the crew had to hold a meeting when there was danger and decide on the best course of action.

Captain Alfred William Brooke Smith said he had had twenty-one years' experience of the sea, and had had sixteen years' experience of

insurance companies and towage cases. He thought a fair charge per hour for towing a vessel by the *Sir Frederick* during fair weather would be £10 per hour. He thought seven or eight guineas per cent. per annum would be the premium for insuring a vessel like the *Sir Frederick*.

Cross-examined by Mr. Sheil: He had never towed a rudderless ship. When in charge of the *Cambrian* he had towed a disabled steamer from the Bay of Biscay to Southampton, a three and a half days' tow, for which he was awarded £1,200, with £500 caused by damages to warps and by a collision with the salved ship.

James Smith, chief clerk for Mr. A. R. McKenzie, tug-owner, of Table Bay, said the *Alert*, one of the tugs of Mr. McKenzie, was about 100 tons, and the *Enterprise* about 50 tons. There was not any towage tariff for their services, but the charge was from £1 to £2 per mile. If there was salvage, the terms would be much higher. To tow into the Bay from Robben Island the charge would be from £10 to £20, according to the size of the ship; that was in fine weather.

Mr. Sheil for the plaintiffs: Although the plea denies that the barque *Leif* was abandoned by the defendant and her crew, after the evidence, and especially the admission of the captain, no two opinions can exist on the subject. There can be no doubt but that the *Leif* was abandoned on the 12th July last, and that she became a derelict. This being so, the case is clearly one of salvage, and all the elements for grounding an action for salvage, as laid down in *Hartje v. Maasdyk* (Buch., 1876, p. 208), are present in this case; (1) It is clear that the ship was in distress; (2) that the services stated were rendered, and (3) that the rendering of these services led to the safety of the ship salved.

Therefore the only question which the Court has to determine is whether the amount tendered was sufficient.

No hard and fast rule can be laid down as to the amount of compensation payable upon salving a ship, because every case must be decided upon its own merits, and there is no subject in respect of which Courts exercise a wider discretion than on that of salvage.

As laid down however by the Privy Council in "*The Chetah*" (2 P.C., 205), in estimating the value of salvage services, circumstances, among others, to be considered by the Court are: (1) The degree of danger to which the vessel was exposed, and from which she was rescued by the salvors; (2) the mode in which the services of the salvors were applied, and (3) the risk incurred by the salvors in rendering these services.

What are the facts in the present case, and what was the position of the Leif when assistance arrived? At 3.30 p.m. on 13th July the Sir Frederick came up with the Leif which was then lying helpless about 40 W. of Cape St. Francis and over 90 miles from Port Elizabeth, being however, only four miles distant from shore. A S.W. swell was setting in, which, in Mr. Searle's and Captain Young's opinion, without the wind from the W.S.W. would have sufficed to have driven her ashore within a few hours. The opinion of these gentlemen is confirmed by the distance which the barque had drifted from the time when she was sighted by Hurr, the lighthouse keeper, until she was discovered by the Sir Frederick. She had then drifted a distance of 27 miles in 30 hours, and there can be very doubt but that she would have been washed ashore on the night of the 13th July if she had not been rescued on the afternoon of that day. Having regard to the nature of the coast there can be no doubt but that if she had gone ashore she would have been a total wreck, and even if some of her cargo were washed ashore it would have been so damaged as to have been practically unmerchantable, but even if it were landed in a merchantable condition it would have been so difficult to convey it overland to Port Elizabeth, that it must have realised but a fractional part of its value.

It is also clear from the evidence that the Sir Frederick ran very great risk in towing the Leif, and that on more than one occasion the tug was in imminent danger.

It is unnecessary to refer to the manner in which the salvage services were rendered as greater skill could not have been exercised.

Under these circumstances it is submitted that the salvors are entitled to a liberal remuneration and that the amount tendered is wholly insufficient.

In the old Admiralty Court of England the award in a case of this kind would have been a moiety of the value of the cargo, ship, and freight, and although the tendency of the Admiralty Division of late has not been to follow the old precedents in the amount of salvage awards, still even now such liberal remuneration is given, especially in the case of derelicts, as to conduce to the protection of life and property at sea. *The True Blue* (1 P.C., 250); *The Cleopatra* (3 P.D., 145); *The Craigs* (5 P.D., 186); *The Scindia* (1 P.C., 241); *The Rasche* (4 A. & E., 127); *The Andrina* (3 A. & E., 286); *The Accomac* (7 T.L.R., 649). See also *the Petunia* (3 E.D.C., 394); *Georgetta Lawrence v. Calcutta* (Buch. 1878, p. 102). and generally on the subject *Kennedy* on Civil Salvage.

Mr. Schreiner, Q.C., A.G., for the defendant: The question whether the Leif was abandoned or not is one of fact to be determined on the evidence, and that matter is left in the hands of the Court. Presuming however that the Leif was abandoned the amount tendered, £500, is more than sufficient remuneration for the services rendered. There was nothing highly meritorious, viz., the saving of life, in the services rendered by the plaintiffs. They did their work well, but there was no difficulty or danger attending the services performed by them. The defendant was on board the Leif during the towing operations, and if nasty weather or danger had been encountered by the Sir Frederick, or if there had been that imminent peril to which, according to Mr. Searle and Harding, the tug was exposed, he must have known of the fact. The current of recent decisions in the Admiralty Division of the High Court of Justice goes to show that even where very meritorious services are rendered a reasonable, not an excessive, remuneration will be awarded. See *The "Dwina"* (L.R. P.D., (1892) 58); *The "Edenmore"* (L.R. P.D. (1893), 78); *The "De Bay"* (L.R., 8 App. Cases, 559); In *Hartje v. Masdyk* (Buch. 1876, p. 208), where the cargo was valued at from £20,000 to £25,000 the Court only awarded £700 for the services rendered.

It is submitted on the authority of the cases cited that the Court would find that the tender made in this case was sufficient.

Mr. Sheil was not called on to reply.

Judgment was given to the plaintiffs, for £1,000 and costs.

De Villiers, C.J.: If this had been an action to recover remuneration for work and labour, the sum of £500, which has been tendered by the defendant, would have been a sufficient and more than a sufficient tender. But I do not understand the Attorney-General to contend that this is not a case of salvage. A larger sum has been tendered than would have been offered if salvage services had not been performed, and the only question is whether that sum is sufficient. All the ingredients of salvage services are to be found in this case. Some degree of risk was incurred in salving the Leif—not perhaps so great a risk as stated by the plaintiffs' witnesses—but still sufficient risk, combined with great skill, to justify the Court in finding that the services were highly meritorious. But, to my mind, the most important element in this case is the extreme danger from which the Leif was rescued. In the cases cited by the Attorney-General the master and crew were still on board and there was still a possibility of the ship's being saved

by their skill and exertions. In the present case the ship had been practically abandoned. I cannot attach much weight to the master's statement that he did not intend to abandon her in the face of the fact that he and the crew left her with sail set and rudderless, exposed to the mercy of the waves and winds near a rocky coast. Even after he had landed he did not immediately take such active steps to procure the means of repairing her rudder as would indicate any intention of returning to his ship. He says that he did not himself think there was much danger but that he was persuaded by the crew, who were unanimous on the point, to leave the ship. There would have been no excuse for his conduct if there had not been real danger, but whether or not there was danger before he left the ship—she was certainly in imminent danger at the time when she was rescued. She had been drifting at the rate of a mile an hour in the direction of a dangerous coast and, but for the timely aid rendered by the plaintiffs, she must inevitably have struck on the rocks within a few hours. There was no other help at hand, and if she had struck, she would have been a total wreck and her cargo rendered practically valueless. What then should be the measure of remuneration? If this case had arisen for decision in the early part of the century the amount awarded would have been considerably more than the current of decisions would allow at the present time. In *Abbott on Shipping* it is said that "in cases of derelict, although the rule is now deemed to be a flexible one, yet Courts of Admiralty still adhere to a moiety as the favourite amount and require some peculiar circumstances to displace it." The case of the *Fortuna* (4 Rob. Adm., 198) had several points of resemblance to the present case. The *Fortuna* was a Danish ship found derelict on the English coast. As against the claim of the salvors it was urged that the ship had been hastily deserted by the crew when there was no real danger, and that it could not be taken as a case of high salvage, nor a case of derelict, and that the salvors incurred no danger and very little trouble. Sir W. Scott, however, held that it was a case of salvage and that the vessel was derelict. The argument that there was no real danger to the ship he dismissed as being in opposition to the conduct of the crew. He added that if the salvors had themselves incurred more danger and trouble he would have awarded a full moiety of the value of the property saved, but under the circumstances he awarded two-fifths. Bearing in mind the current of modern decisions the proportion awarded in this case must be much less than two-fifths of the value of the ship and

cargo, but it should not be less than one-sixth. In our opinion, the sum of £1,000 would be a fair remuneration, and for that sum judgment must be given with costs.

Mr. Justice Upington said: I am entirely of the same opinion. I think that highly meritorious services were rendered by the Sir Frederick, and but for those services the vessel would have been a total wreck.

Mr. Sheil asked the Court to apportion the salvage remuneration under 17 and 18 Vic., cap 104, sec. 498.

The Chief Justice: We cannot very well apportion the amount awarded as there is no prayer for an apportionment in the declaration, but I have no doubt the Boating Companies will deal liberally with those employed by them.

Mr. Sheil applied for Mr. Searle's expenses as a witness and they were allowed.

[Plaintiff's Attorneys, Messrs. Scanlen & Syfiet; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

REGINA V. ROOS.

Mr. Giddy applied for the removal of the trial of J. A. Roos, charged with forgery at Robertson and Barrydale, from the Supreme Court to Worcester.

The application was granted.

The Court adjourned until to-day.

LAZARUS V. LEVIN. } 1895.
Principal and agent — Overcharges — } Aug. 30th.
Vouchers.

Where an agent had undertaken to import merchandise for his principal and had overcharged him considerable sums, and had failed to render vouchers for certain alleged disbursements in respect of freight, insurance, and dock dues, the Court ordered the agent to supply the vouchers within three months, although there was some evidence to show that it was not customary to render vouchers for such items

This was an action for an account instituted by Samuel Lazarus, carrying on business at Oudtshoorn as Lazarus & Co., against Jacob Levin, carrying on business in Cape Town and in London.

2. The declaration alleged that in June, 1893, the parties agreed that the plaintiff should order goods for his business from and through the defendant upon certain terms and conditions, not necessary to specify, and it was agreed that the defendant should land all such goods bought by the plaintiff for and on

his behalf and as his agent, and should advance and disburse all shipping and freight charges in England and all Customs duties, landing and wharfage charges, and generally all expenses and charges connected with the shipping, importing, and landing of such goods in this colony, for and on behalf of the plaintiff, and that the defendant should repay the plaintiff all such sums disbursed for and on his account.

3. The plaintiff did during the years 1893, 1894, and 1895 order goods from and through the said defendant which were shipped, imported, and landed for the plaintiff by the defendant, and the defendant from time to time rendered to the plaintiff accounts of the disbursements made by him for and on account of the plaintiff in England and in this colony. The plaintiff under the *bona-fide* belief of fact that the defendant had actually made the said disbursements, and relying upon the statements made by the defendant that he had made them, repaid to the defendant the said sums charged by him as aforesaid.

4. Among the goods so ordered by and shipped, imported and landed, for and on behalf of the plaintiff, were certain shipments by the R.M.S. Gaul, and the defendant rendered the plaintiff an account dated the 25th of August and September 22, 1893, showing that the defendant had disbursed for and on behalf of the plaintiff the sum of £37 10s. 7d., being the Customs duty upon the amount of £729 16s. 11d., which sum the plaintiff repaid to the defendant under the circumstances aforesaid. The defendant did not pay that sum as Customs duty, and did not pay Customs duty upon the amount of £729 16s. 11d., but only paid Customs duty upon the amount of £571, to wit the sum of £68 8s., and wrongfully and improperly and in breach of his duty charged and received from the plaintiff £19 10s. (more or less) more than the defendant had actually disbursed on his account.

The plaintiff was not aware of these said facts when he repaid the defendant as aforesaid, and none of the said accounts charging the plaintiff with disbursements are supported by vouchers or receipts.

5. The defendant has in other cases of goods shipped and landed as aforesaid charged the plaintiff more than he has actually disbursed, and the plaintiff has demanded from the defendant a full and detailed account of all disbursements made by him for and on account of the plaintiff during the years 1893, 1894, and 1895, duly supported by vouchers and receipts, which account it is the duty of the defendant to render but the defendant has refused to render any such account.

6. If the said account is rendered there will be found upon debate thereof that a considerable sum of money has been wrongfully and improperly charged by the defendant to the plaintiff, and paid by the plaintiff under the circumstances aforesaid, and which are due by the defendant to the plaintiff.

The plaintiff claimed :

(a) A full and detailed account duly supported by vouchers and receipts of all moneys disbursed by the defendant for and on behalf of the plaintiff during the years 1893, 1894 and 1895.

(b) A debate of the said account.

(c) Payment of all sums which upon debate thereof may be found to have been wrongfully and improperly charged to and paid by the plaintiff and which are now due to the plaintiff.

(d) Alternative relief and costs of suit.

The defendant filed the following plea :

1. He admits the allegations in the first paragraph of the declaration.

2. In or about the month of June 1893, and thereafter at divers times during the years 1893, 1894 and 1895, the plaintiff purchased certain goods and merchandise from the defendant on the following terms :

(a) The goods were to be delivered to the plaintiff by the defendant at a certain fixed price within a reasonable time, to allow the defendant to order and import the said goods from England.

(b) The goods were to be shipped to the port of Mossel Bay, and were there to be landed and cleared by the defendant or his agents.

(c) In addition to the purchase price of the goods fixed as aforesaid the plaintiff was to repay to the defendant all amounts paid by the latter for cases, London shipping charges, freight, duty, landing charges, wharfage dues, or other expenses in connection with the shipping and landing of the said goods.

3. The defendant did from time to time import and land at Mossel Bay and did thereafter deliver to the plaintiff the goods so purchased by him, and did from time to time render him accounts showing the amounts due for the purchase of the said goods and for disbursements in connection with cases, London shipping charges, freight, duty, landing charges, dues and expenses as aforesaid, and the said accounts were duly paid by the plaintiff.

4. Subject to the above the defendant denies the allegations in the second and third paragraphs of the declaration, and he specially denies that he made any disbursements on the plaintiff's account in England or acted as his agent in ordering goods there.

5. As to the fourth and sixth paragraphs he admits that in the said accounts rendered to the plaintiff the latter was charged with Customs duty calculated upon the purchase price agreed as between the parties and not upon the cost price of the goods to the defendant when imported—upon which latter amount only duty had actually been paid by him: and he admits that the figures relating to the duty paid upon the goods per Gaul were substantially as stated in the declaration.

6. He admits that the charges so made were erroneous and that he is only entitled to claim from the plaintiff the amount actually disbursed by him for duty and the other expenses aforesaid, and he has recast all the accounts rendered by him to the plaintiff for the period aforesaid so as to charge the latter only for the actual disbursements aforesaid, and he has rendered to the plaintiff new accounts upon the said basis. The accounts when so recast show a balance due to the plaintiff of £86 12s. 6d., and this sum the defendant tendered on the 14th day of May, 1895, to pay to the plaintiff together with costs of suit to that date, and he hereby repeats the said tender. Subject to the above he denies the allegations in the fourth and sixth paragraphs of the declaration.

7. As to the fifth paragraph the defendant says that the plaintiff did not desire to be supplied with vouchers in respect of the accounts originally rendered and accepted from time to time. As to the amended account since rendered by the defendant he has supplied all vouchers which it is possible to obtain, and has offered, and hereby again offers, to the plaintiff access to all books and documents in his possession relating to the said goods.

8. The plaintiff refuses to accept the amended account rendered to him by the defendant and wrongfully contends that the defendant is only entitled to payment for the cost price of the goods to him and not for the purchase price agreed upon as aforesaid.

9. The defendant is willing to debate the items of the amended account rendered by him, before any person agreed upon between the parties or appointed by this Honourable Court, and hereby offers so to do.

10. The defendant denies the allegations in the seventh paragraph, and he says that the only sum due by him to the plaintiff in respect of the transactions hereinbefore referred to is the said sum of £86 12s. 6d., which he has offered to pay.

Wherefore he prays that the plaintiff's claim may be dismissed with costs.

The plaintiff in his replication said that he purchased goods at the various dates mentioned

in the plea, but he said that the price agreed upon was manufacturers' costs, and all orders, documents and invoices were signed, accepted, and paid by the plaintiff upon the representations of the defendant or his duly authorised agent, and under the reasonable and *bona-fide* belief of fact that the prices of the goods were those agreed upon between the parties. All the invoices rendered to the plaintiff from time to time purported to be invoices sent by the defendant from London as well as from Cape Town.

All the goods which were consigned direct to the plaintiff were to be shipped to Mossel Bay, and cleared as alleged in the plea, and all the invoices upon which the goods were to be cleared were made out to the plaintiff as aforesaid.

As to sub-section (c) of paragraph 2 the plaintiff says the defendant had to pay also Customs dues on the said goods for and on behalf of the plaintiff, which dues the plaintiff was to reimburse the defendant, and of which charges the defendant rendered accounts.

The defendant has now rendered the plaintiff another account, from which it appears that in landing and clearing the goods bought by and shipped to the plaintiff the defendant paid Customs dues for and on behalf of the plaintiff to the amount of £428 3s. 5d., whereas in the previous accounts paid by the plaintiff and rendered by the defendant the amount alleged to have been so disbursed figured at £514 15s. 11d.

That on landing and clearing the said goods for the plaintiff at the port of Mossel Bay Customs duty was payable upon the invoiced price of the goods to the plaintiff, and it was the duty of the defendant to present such invoices to the properly constituted Customs officers, and the defendant in the course of his duty did so present invoices, declaring the value of the goods so landed for the plaintiff to be the sum of £1,778. These invoices were the true invoices in terms of the plaintiff's contract with the defendant.

That the defendant wrongfully and in breach of his trust and in fraud of the plaintiff did not forward or render to the plaintiff these said invoices, but rendered to the plaintiff other invoices in which the said goods were priced at the sum of £2,337 5s. 1d., or an overcharge of £559 5s. 1d., which the plaintiff paid in ignorance and under the belief as aforesaid.

The said sum of £559 5s. 1d. is due and repayable by the defendant. The defendant has paid other charges and made other disbursements for and on behalf of the plaintiff, but the defendant, who is the same person who carries on the business in England, has failed to supply the plaintiff with any vouchers, and the

plaintiff is unable to ascertain whether these charges were due and proper or upon which invoices they are based.

The plaintiff admitted the tender £86 12s. 6d., but he denied that it was sufficient or that the account rendered was complete and duly supported by vouchers.

The remainder of the replication was general.

Mr. Juta, Q.C., and Mr. Jones for the plaintiff.

Mr. Graham and Mr. Benjamin for the defendant.

Samuel Lazarus, shopkeeper, Oudtshoorn, said he was a feather-buyer until 1893. In May, 1893, he was erecting his shop at Oudtshoorn, when Jacobs, a traveller of the defendant, came, and he gave him certain orders. A man named Lee with a shop opposite his was a direct importer, and he was afraid Lee would be able to undersell him, and he therefore told his fears to Jacobs, who said that was not likely to happen if he dealt with defendant, because defendant had his own manufactories, and would let him have goods for the bare London cost price, with a small margin of profit. The terms of payment for the goods were arranged, and he said to Jacobs "if I can't sell for the same price as Lee I shall not buy from you." When he ordered goods he was told what purported to be the London cost of the goods he was ordering, and then asked the cost of freight and duty, and was told 22 per cent. or 25 per cent. He got the first shipment of goods in October, 1893. In 1894 he ordered goods through a firm named Durant, and got them very much cheaper than from defendant. He then thought defendant's factories must be very dear ones, or that defendant had been humbugging him. Defendant's invoices were in three batches, the first purporting to show the London cost of the goods, then the London disbursements upon them, and thirdly, the local disbursements upon them. He and his storeman Malone went to the Mossel Bay Customs-office and found that the defendant had been charging him much higher Customs duties than he had paid. He found that on a shipment by the Gaul defendant had charged him £87 10s. duty on a consignment supposed to have been of the value of £729 15s. 11d., whereas defendant had paid duty on a value of £571. He had only given a small order to the defendant since. He had now £1,200 worth of the defendant's goods in his store. When he first got the defendant's goods, he put 25 per cent. on the price they were costing, but could get no customers for the goods.

Cross-examined: He remembered Jacobs first coming to Oudtshoorn, and saw him showing his samples with the prices marked on them. He believed Jacobs was a good pious man

—and he believed his statements as to these being London prices. He was told that shirts, boots and shoes, and clothing were manufactured in the defendant's factories. He had sent orders for various kinds of goods, and was told that such goods as the defendant did not manufacture he would sell to him at a small advance on cost price. He gave one order in June, 1893, and repeated some portions of the order in November because some portions of the previous order had not been executed. In June, 1894, he wrote desiring that some of his bills be held over a little time. In the letter he said he was doing a fair business, and intended to purchase all his goods from defendant. As a matter of fact he had not done a very good business, but his creditors were pressing and he wanted time. He had since that often told Lewin's traveller he would buy no more goods from him. Competition was keen in Oudtshoorn. He wanted to be able to sell as cheap as Lee, and Jacobs told him Lee purchased goods from defendant. The orders produced were those he gave to Jacobs.

The Chief Justice: Every order you signed bears the price of the goods ordered opposite each article. What, then, can you complain of if you are charged these prices?

Mr. Juta: That they are not factory prices.

The Chief Justice: Then the action is wrongly brought. You must bring an action for false representation—that defendant falsely represented these were factory prices. Of course, that is a charge of fraud.

Mr. Juta: Of course, we understood that we should have been charged on the invoices on which defendant paid Customs duty. The invoices he sent us were fraudulent invoices. We paid Customs duties also in the belief that we were repaying an amount paid by defendant to the Customs.

The Chief Justice: It certainly is an extraordinary thing that defendant should have tendered the excess charge on Customs dues.

Mr. Juta: And further tendered an amount as overcharged on freight and insurance.

The Chief Justice: Well, you can't go into one part of this claim in the face of the orders signed by plaintiff. The only things he can claim are the vouchers for the shipping and other charges on the goods.

John Maloney, manager of the plaintiff's business, said he had inspected some of the invoices sent by defendant to plaintiff. He had not seen all the documents necessary for a careful calculation, but taken at 47s. 6d. per ton, the charges rendered by

defendant for freight were excessive. On freight, dock dues, and insurance, defendant had overcharged plaintiff a total of £18.

Cross-examined : The defendant had tendered £12 as overcharged since he had made his calculation, which would leave £6 still to make up. He did not know that it was unusual for firms at Home to send freight receipts; commission agents did it. In making his calculations he had taken freight at 47s. 6d. per ton, insurance charges at 7s. 6d. per £100, and dock dues at 3s.

Antonio Lorenzo Chiappini, bookkeeper to Messrs. Eaton, Robins & Co., said he had assisted the last witness in checking the figures, and on a freight of 47s. 6d. there was an overcharge in the defendant's accounts. The charge of 3s. was a good one for dock dues, and on that charge defendant had overcharged. The total overcharges were about £18.

Cross-examined : The charge of 7s. 6d. for insurance ought to cover "all risks."

For the defence,

Julius Lewin, manager for Jacob Lewin, said they had carried on business for over twenty-five years. With regard to the accounts, he said freight receipts were never sent. It was not the practice, and he had never seen it done. It would have been impossible to have got one for Lazarus's goods, because they came on one bill of lading with goods for other people. He calculated the freight charge on the measurements of the cases as shown on the English invoices at 47s. 6d. per ton.

By the Chief Justice : They had their own office in London, but they had not instructed their people to keep the charges for Lazarus's goods separate. It was never done in any case.

Mr. Justice Upington : I import very few goods, but when I do I always get all the documents.

Witness (continuing) said the charges as now rendered were absolutely correct. The first account was a wrong one. It had been made when he was away. The insurance was calculated at 12s. 6d., which was very moderate, covering all risks and risk of fire until loaded on the wagon at Mossel Bay.

By the Chief Justice : As to the overcharge of £86, he would say they worked out the duty on the invoices which Lazarus paid. They imported the goods for themselves, not for Lazarus. They paid the duty on what the goods cost them, and charged Lazarus duty on what they sold the goods to him at. If Lazarus had imported the goods he would have had to pay what they charged him. They never paid the full duty they charged Lazarus, but he felt justified in making the charge. It might have been a mistake in that respect, but it was not an error of account.

Cross-examined : He did not know the insurance charge actually paid, but 12s. 6d. was a fair price. He knew 47s. 6d. per ton was the first-class charge for goods, and there would be very little indeed of second-class goods in plaintiff's consignment.

Arthur Ball, agent for the Alliance Insurance Company, said that 12s. 6d. would be a fair charge of insurance if it covered all risks including risk of fire at Mossel Bay.

George Jas. Lovelock, clerk of the Union Company, said that the rate of freight from England to Mossel Bay was 47s. 6d. for first-class goods during 1893 and 1894.

John Anderson, agent for Kaunreuther & Co., Birmingham, said freight receipts were never sent out by the English firms. The receipts might be sent if the charge was disputed.

Augustus Charles Huntley, agent for Messrs. Watts, Manchester, said it was unusual to send out freight receipts with goods. A large firm he had worked for had not done it in the nine years of his experience.

Cross-examined : They had never been asked for them.

Witness Maloney (recalled) said he considered they had been overcharged about £5 on the matter of freight. Calculated at 12s. 6d., the defendant's charges for insurance would be about correct.

Witness Lovelock (recalled) said that according to the figures shown by the defendant of the cubical contents of the cases supplied to the plaintiff the charge at 47s. 6d. per ton would be £91 12s. 7d. Defendant had charged plaintiff £91 19s. 1d. His calculation of £91 12s. 7d. did not include the cost of furnishing bills of lading, for each of which 1s. 6d. might be charged.

Mr. Juts and Mr. Graham having addressed the Court,

Judgment was given for the plaintiff with costs.

The Chief Justice said : The evidence in this case shows that the plaintiff was quite justified originally in instituting an action against the defendant. Throughout the correspondence preceding the action and pending the action the defendant positively denied that there had been any mistake in the account which he had rendered, and denied that he owed anything to the plaintiff. He repeated the denial after the summons was issued, and it was only after the issue of declaration and when the action had been long pending, that the defendant for the first time admitted that he had made a mistake in overcharging the plaintiff in respect of the item of Customs dues. Now, that overcharge does appear to me very extraordinary. The defendant had paid a certain

amount for Customs dues, and it is quite clear under his contract with the plaintiff that he was not entitled to charge the plaintiff with more than the amount he had actually paid, yet he charges the plaintiff with the amount which would have been payable if the goods had been imported at the rate at which they were sold to the plaintiff. He was not at all justified in doing that. The Court cannot lose sight of the fact that the plaintiff was entirely at the mercy of the defendant. The defendant was the one who paid the disbursements, he kept the accounts, and it was so easy a matter for a person in the position of the defendant to defraud a person in the position of the plaintiff. I don't say that Mr. Juts was right in using the word "defrauded" in regard to the defendant's action—it probably did not amount to fraud, but it was certainly very sharp dealing. The plaintiff might never have discovered the overcharge but for an accident, and he was left under the impression that he was only charged with the amount actually paid by the defendant. And it is only after the defendant had made every attempt to bluff (if I may use the expression) the plaintiff that at length he consented to make this tender. Then after the tender is made, plaintiff further insists on his rights, and insists on a discovery upon oath, and then only, on August 22, the defendant discovers a further amount of £12 which ought to have been repaid. There were no particulars in the account, consequently the plaintiff was not satisfied with it and only yesterday a fresh account is sent to show how this amount of £12 is made up, and then apparently it is found to be made up from accounts relating to such varied items as insurance, freight, dock dues, and Customs duties. Bearing only then on the question of costs, the mere fact that only yesterday was this account—showing how the amount was made up—rendered, would entitle plaintiff to his costs. Now the only question which remains after the matter has been fully discussed is as to whether the defendant was bound to render vouchers for freight, dock dues, and insurance paid by him. Well, there was some evidence that it was not customary to render vouchers for these items, but neither I suppose is it customary for cases of this kind to arise. As a rule an agent deals fairly and above board with his principals, and they do not insist upon the minutiae of all the accounts being rendered. But when once the plaintiff found that his confidence had been abused I cannot say that he was wrong in insisting on all information being furnished which it was possible for the defen-

dant to furnish. It is by no means impossible for the defendant to furnish the further information still wanted—what the amount paid for freight was, what the amount paid for insurance was, and what the amount paid for dock dues was. There should be no difficulty in producing the vouchers showing the full amounts paid by the defendant for freight, and then from these vouchers deducting the proportion payable on the defendant's own goods, leaving the balance which the plaintiff should have paid. The same with regard to insurance. There should be no difficulty in obtaining from England the receipts for premiums paid by the defendant, and these premiums ought to show which goods belong to the plaintiff and which to the defendant, and if the receipts or premiums do not show it, then the accounts will show it. At all events, these vouchers will show the actual rate of insurance paid by the defendant. The same in regard to dock dues. I am not prepared to take the statement of the defendant on the subject. Without further evidence it is impossible to say what has been paid for dock dues. Of course, all this cannot be done at once. A period of three months ought to be allowed for the defendant to obtain this information. Plaintiff has spoilt his case, I may say, by the replication. It is utterly absurd, in my opinion. The original orders are produced, all signed by the plaintiff himself, and with the prices of the different articles all mentioned in the orders, and now in the replication the plaintiff says that he was only to be charged the actual manufacturers' prices in England. That is incredible, and the only question for us now is whether, the plaintiff having so spoilt his own case, it ought not really to affect the question of costs. But as there is an important principle involved; that a person in the position of the plaintiff, dealing with a person in the position of the defendant, is entitled to a full and complete account of the defendant's dealings, with every item of expenditure made on his behalf, and inasmuch as the defendant at first made up accounts which were misleading, and as he—I won't say defrauded—but abused the confidence of the plaintiff by making these large overcharges, judgment will be given for the plaintiff for the amounts tendered with costs, and an order made upon the defendant to furnish within three months vouchers for freight, insurance, and dock dues paid by him in respect of the plaintiff's goods.

Mr. Justice Upington said: I fully concur with the judgment. An offer should have been made by defendant in May last, when refunding this money, to debate the account, and fully go

into it, and satisfy plaintiff as to what was actually owing, and so put an end to the matter.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Defendant's Attorney, W. E. Moore.]

NEEZER V. NEEZER'S EXECUTORS. { 1895.
Aug. 30th.

This was an action for £264 5s. 8d., instituted by Mr. G. W. L. Neezer against the executors of his father's estate, in respect of moneys paid by him on account of his father during his lifetime.

Mr. Sheil appeared for the plaintiff.

Mr. Graham and Mr. Close for the defendants.

By consent judgment was entered for the plaintiff for the sum of £67 9s. 8d. in full settlement of all claims against the estate, and on the understanding that all claims against the plaintiff by the estate of his father and mother should be withdrawn against him.

The costs were ordered to come out of the estate.

LEONARD V. VAN NIEKERK.

Mr. Graham applied for the issue of a commission to take the evidence *de bene esse* of certain witnesses for the plaintiff at Johannesburg, and for the appointment of Mr. Advocate de Villiers as commissioner for the purpose.

The application was granted.

LYNCH V. COLONIAL GOVERNMENT.

Mr. Benjamin applied to make absolute the rule *nisi* admitting applicant to sue *in forma pauperis* in an action against respondents for the recovery of damages for personal injuries sustained through the negligence of respondents' servants in charge of a railway engine.

Application granted.

VAN AARDT V. JEFFERSON.

Mr. Benjamin applied for an order directing the Sheriff of the Colony to cancel the sale to the plaintiff of certain three farms in the district of Barkly West, attached in execution of the judgment in the suit between the parties, the defendant having arranged to satisfy the said judgment in full and the plaintiff agreeing to such cancellation of the sale.

Order granted.

BICCARD'S TRUSTEES V. ALBERTYN AND COLONIAL GOVERNMENT.

This was an application for an order attaching and declaring executable so much of certain sum of money of the first-named respondent in the

possession of Government as will satisfy a judgment and costs obtained by applicants in the Court of Resident Magistrate for Calvinia, on which a return of *nulla bona* has been made.

Mr. Sheil applied for the case to be allowed to stand over *sine die*.

The application was granted.

WILLEMSE AND OTHERS V. LATEGAN. { 1895.
Aug. 30th.

Warrant of apprehension—Criminal offence—Summary jurisdiction—Divisional Councils Act, 1889, sections 153 and 154—Swing gate.

Except where otherwise specially provided by law, warrants for the apprehension of persons charged with offences, which plainly appear to be proper for a Court of summary jurisdiction, should not be granted unless the person charged shall first have been summoned and shall have neglected, on the day appointed by the summons, to appear to answer the charge.

To support a prosecution for a contravention of the 154th section of the Divisional Councils Act, 1889, it is not necessary to prove that the Divisional Council has approved of the swing gate, which the defendant is charged with having left open.

A person so charged should not be arrested until he has neglected to appear to a proper summons.

This was an appeal from a sentence passed upon the appellants by the Resident Magistrate of Worcester.

The accused, who had been arrested on a warrant for contravening section 2 of the repealed Act 37 of 1879, were charged with contravening section 154 of Act 40 of 1889, in that on or about the 1st day of August, 1895, and at or near the farm Kleinberg, in the district of Worcester, the said accused, not being owners of land in terms of the said Act, did wrongfully and unlawfully pass through a swing gate erected by one Andries Lategan, an occupier of land over which a public road passes, and did not immediately after so passing through said gate close and fasten same.

The prisoners being arraigned pleaded not guilty.

The evidence went to show that the road upon which the gate was erected, although neither a main nor a Divisional Council road, was largely used by the public.

On the morning of the 1st August the complainant, Lategan, saw Willemse (whom he had on a former occasion warned not to leave the gate open) and the other two accused pass with a wagon through the gate, which they left open. Lategan then warned them, as they refused to close the gate, to appear before the Magistrate on the 3rd August, and fearing that they would not appear in answer to the summons he had them arrested.

The case for the defence was that the gate in question was not a swing gate within the meaning of the 153rd section of the Act, inasmuch as though as originally constructed it did swing, latterly it had scraped the ground, and could not swing freely if pushed, but had to be dragged open.

The accused were found guilty, and Willemse was sentenced to pay a fine of 10s., or fourteen days with hard labour. The other two prisoners were fined 5s. each, or one week's hard labour.

The following were the Magistrate's reasons:

The prisoners were correctly charged under the above-mentioned Act (40 of 1889), but the warrant under which they were arrested charged them with contravening section 2, Act 37 of 1879. This occurred through a clerical error and was not observed by me at the time of signing the warrant. The prisoners' agent contended that as the warrant cited the section of an Act which had been repealed, they were entitled to their discharge, but as I find that the Act No. 40 of 1889, which repeals the said Act, has re-enacted the provisions of the section almost in the same terms, and that the prisoners had by their conduct committed a substantial offence, I considered that they had not been prejudiced by a wrong section and Act having been quoted in the warrant.

The facts alleged by Mr. Lategan were proved to my satisfaction, and although it was shown that the gate put up by him has latterly scraped the ground when being opened and closed, I did not consider this to amount to such disrepair as to render the whole proceeding of the placing of the gate there by the complainant nugatory and unlawful. I am of opinion that the best swing gates might after a while relax somewhat of their stability, especially on a public track, not under responsible supervision and maintenance and therefore subject to rising and falling through the effects of floods, nor did I think that the provision that such gate should be kept in proper repair to the satisfaction of the Divisional Council by the owner or occupier of the land actually meant that it should not be put up at all without the sanction and approval of the Council, as previously to the passing of the said Divisional

Councils Act such owner or occupier might have put up such gate without the sanction of anyone, and the latter Act only appears to provide some remedy for a case in which an owner of land might not put up a proper swing gate, or having put up one neglects to keep it in proper order.

From this judgment the prisoners now appealed. The grounds upon which they appealed are as follows:

(a) That the defendants were arrested, and prosecuted for contravening section 2 of Act No. 37 of 1879, which is now repealed.

(b) That the defendant were not duly charged with the contravention of section 154 of Act 40 of 1889.

(c) That the plaintiff had not erected or kept in repair such a gate as is provided by section 153 of Act 40 of 1889; and that the said gate was not across a public road, path, or track.

(d) That the plaintiff had not complied with the provisions of the said section 153, nor had the defendants committed any breach of the said section 154.

Costs were prayed against the respondent Lategan.

Mr. Graham in support of the appeal: The only question to be determined is whether the gate, which the appellants were charged with leaving open, was a swing gate within the meaning of Act 40 of 1889, section 153. It is clear from the Magistrate's finding that the gate did not swing freely, that it scraped the ground, and consequently could not afford free passage, nor was it kept in repair to the satisfaction of the Divisional Council. Such a gate, it is submitted, cannot be regarded as a swing gate.

Mr. Sheil for the respondent: It is submitted that the Magistrate's judgment was correct. As long as a gate affords free passage to persons entitled to use the road that is sufficient to satisfy the requirements of the section—*Regina v. Neethling* (4 Sheil, 7). The question is one of fact. The gate being slightly out of repair did not prevent its remaining a swing gate, so at least the Magistrate found.

Mr. Giddy for the Crown was not called on.

Mr. Graham in reply: *Neethling's Case* does not apply, as the Court in that case only laid down that it is not necessary that a swing gate should swing on both sides of the fence on which it is placed. The other requirements of the section were not touched on.

The Court dismissed the appeal.

De Villiers, C.J.: I must repeat the remark which I made during the argument, that it was a harsh proceeding to arrest these men until they had failed to appear on a summons.

Under the 68th Rule of the Magistrates' Courts the process for compelling the appearance of the party charged is by summons, and it is only when he neglects to appear upon the day appointed that a warrant for his apprehension should be issued under the 73rd Rule. Under Ordinances 40 and 73 Resident Magistrates have the power of granting warrants for the apprehension of persons charged with criminal offences, but it is reasonably clear from the 27th section of the former Ordinance that this power was not intended to be invoked or exercised in regard to offences which plainly appear to be proper for a Court of summary jurisdiction. The appellants were charged with the paltry offence of failing to close a swing gate placed by their prosecutor across a public road, and thus contravening the 154th section of Act 40 of 1889. The highest penalty for this offence is a fine of five pounds, or in default of payment, imprisonment with or without hard labour for thirty days. It was obviously a case for the exercise of the Magistrate's summary jurisdiction, but, without any previous summons or even any reasonable grounds for believing that a summons would not be obeyed, a warrant for the arrest of the appellants was applied for, issued, and carried into execution. There are certain offences which, although plainly falling within the Magistrate's summary jurisdiction, have by special enactment been made punishable without previous summons, but the present is not one of them. I trust that magistrates generally will bear in mind that the liberty of the subject is not thus to be trifled with. The circumstance that the appellants have been harshly dealt with by the prosecutor cannot, however, affect the question whether they have committed the offence charged against them. The only doubt which I have had upon the matter arises from the fact that there is no proof that the Divisional Council of Worcester has approved of the swing gate, but on consideration I have come to the conclusion that such proof is not necessary. The 153rd section of the Act requires that such gates shall at all times be kept in proper repair to the satisfaction of the Divisional Council, but does not require the consent of the Council to such gate being placed across the public road. The object of the requirement, read by the light of the proviso which follows, probably was to confer on Divisional Councils the right of interference where the free use of public roads is obstructed by means of gates not substantially constructed or properly hung. On the appellant's behalf it has been contended that the prosecutor's gate was not a proper swing gate, inasmuch as it scraped the ground when opened or closed, but

this is a question of fact upon which the evidence justifies the verdict. The prosecutor swore that it was a proper swing gate and he was not cross-examined on the point. A witness for the defence said it was originally a swing gate, but that it now scraped the ground, but he was not supported by any other witness. Under all the circumstances the Court is of opinion that the appeal must be dismissed.

[Appellants' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondent's Attorneys, Messrs. J. C. Berrangé & Son.]

REHABILITATION.

Mr. Close applied for the rehabilitation of Arthur Bibbey.

Application granted.

SCOTT V. MCCOLLA. { 1895.
Aug. 31st.

Rule 319—Account.

Judgment given under Rule 319 for an account, which was ordered to be rendered within fourteen days, failing which, judgment was granted for a definite amount.

Motion for judgment under Rule 319.

The declaration alleged that in March, 1895, the plaintiff handed to the defendant, in his capacity as an attorney of the Supreme Court, certain valuable documents and papers having reference to the plaintiff's business, and he instructed the defendant, in his aforesaid capacity, to collect certain sums of money due to the plaintiff by various debtors.

That the defendant duly undertook for a reasonable remuneration to collect the said sums of money, and did collect the same, but had failed to hand over to the plaintiff the amounts received by him on the plaintiff's account.

That on a true and correct account being stated by the defendant of all monies received by him on the plaintiff's account there would be found to be due by him to the plaintiff the sum of at least £57 19s. 6d.

The plaintiff claimed:

(a) That the defendant might be ordered to forthwith render a true and correct account of all moneys received by him on the plaintiff's account, and to pay to the plaintiff such sum or sums of money as might be found to be due to the plaintiff on a debate of the said account, together with interest at 6 per cent. per annum from the date of the receipt by the defendant of the said amounts.

(b) That the defendant might be ordered to deliver to the plaintiff the documents and papers aforesaid.

(c) Alternative relief and costs.

The defendant was in default and had been duly barred.

Mr. Sheil moved.

Judgment was given for the plaintiff with costs, the defendant to render a full and true account within fourteen days, failing which, judgment was entered against the defendant for £57 19s. 6d. The defendant was also ordered to deliver to plaintiff all documents and papers in his possession and belonging to the plaintiff.

[Plaintiff's Attorney, D. Tennant, jun.]

REHABILITATIONS. } 1895.
Aug. 31st.

Mr. Buchanan applied for the rehabilitation of Spencer Frederick Fleischer.

The application was granted.

Mr. Tredgold applied for the rehabilitation of William Cadogan McNellan (trading as Thos. Gardner, Son & Co.).

Application granted.

Mr. Jones applied for the rehabilitation of Ferdinand Walder, sen.

Application refused, with leave to apply again in three months.

Mr. Castens applied for the rehabilitation of John Graham McGregor.

Order granted.

Mr. Tredgold applied for the rehabilitation of Peter Gerhard Maynier.

Order granted, subject to a duly attested balance-sheet being provided.

Mr. Close applied for the rehabilitation of Hans August von Broembsen.

Order for release granted.

Mr. Benjamin applied for the rehabilitation of Jacob Johannes Naudé Haarhoff.

The order was granted, subject to the presentation of a proper balance-sheet.

IN THE INSOLVENT ESTATE OF THE LATE
PIETER J. DU TOIT.

Mr. Sheil applied for appointment of a commission to examine Peter E. J. du Toit and others touching all matters relating to the trade, dealings, and estate of the said insolvent.

The application was granted, and the Resident Magistrate of Murraysburg appointed commissioner.

IN THE MATTER OF THE MINOR ARCHIBALD
KENT.

Mr. Stoney applied for an order confirming the purchase made by the tutors

testamentary on behalf of the said minor of the farm Ulster, situated in the division of Albany, and for authority to pass a bond to the Colonial Government for the amount of the present mortgage thereon, and to pay the balance of the purchase price into the estate of the minor's father.

Order granted.

IN THE INSOLVENT ESTATE OF THE LATE GEORGE
MASON EDMEADES.

Mr. Close applied for an order to make absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act, for transfer to the said estate of certain erven, situated in the town of Oudtshoorn, bought by the said Edmeades from various persons, some of whom are dead and unrepresented, and others have left the Colony, and whose whereabouts are unknown.

Order granted.

STARCK V. STARCK.

Mr. Sheil moved for an extension of the return day until 1st November next.

The application was granted.

Ex parte EDMEADES. } 1895.
Re JEFFREYS' WILL. } Aug. 31st.
Sept. 12th.

Executor Testamentary—Error in name.

Where a testator had, by his last will, appointed John Mason Edmeades of Oudtshoorn his executor, and there was no person of that name in the district, but there was evidence to show that the testator intended to appoint his friend, John Robert Bazett Edmeades, his executor, the Court granted a rule calling upon all persons concerned to show cause why letters of administration should not be granted to J. R. B. Edmeades.

This was the petition of John Robert Bazett Edmeades, of Oudtshoorn.

The petitioner alleged that he was an intimate friend of the late John Roger Jeffreys, of Armoed, in the district of Oudtshoorn, who died on the 13th July last, leaving a will in which he appointed one John Mason Edmeades, of Oudtshoorn his executor.

The petitioner alleged that there was only one family of Edmeades in the district of Oudtshoorn, or, as far as the petitioner was aware, in the colony.

That the family consisted originally of six brothers, of whom the petitioner was one.

That one of the brothers was called George Mason Edmeades, but he died in 1888 and before the making or execution of Jeffreys' will.

That there were now no Edmeades in the district with the name of Mason nor was there at the time of the execution of the will, nor is nor was there any other Edmeades with the name of John in the district except the petitioner.

The petitioner alleged that he was the person intended by the deceased to be his executor, he having stated so shortly before his death in the presence of the petitioner and of one Walter Powrie.

The prayer was :

1. That the Court might confirm his appointment as executor and authorise the Master to issue letters of administration to him forthwith.

2. Sanction the payment of the costs of the petition out of the estate.

Powrie in his affidavit stated that on 30th June, 1895, he and the petitioner were present together at the bedside of the deceased, when the latter said, looking towards the petitioner: "I made a will some time back and have appointed you, John Edmeades, my executor."

Mr. Graham moved, and cited *In re Estate of McInerney* (Buch. 1879, p. 43).

The Court granted a rule nisi calling on all persons concerned in the estate to show cause on September 12 next why the applicant should not be appointed executor, the rule to be published once in the "Oudtshoorn Courant."*

[Petitioner's Attorney, Gus. Trollip.]

ABRAHAMS V. ABRAHAMS. { 1895.
Aug, 31st.

This was an action for divorce by the plaintiff on the ground of the adultery of her husband.

Mr. Buchanan appeared for the plaintiff.

Mr. Norman Lacy produced the marriage register. The marriage took place in 1889.

Elizabeth M. Abrahams, the plaintiff, said the marriage took place at S. Mark's Church, Cape Town. There was one child of the marriage, a girl nearly six years old. She and her husband were happy for a year, and then he left her, preferring her sister. She had not lived with her husband since. Occasionally he sent her some of his wages, which at the time of marriage were £1 5s. a week.

*On the return day the rule was made absolute.

Jane Fisher, of Wale-street, said the respondent used to live at her house. He lived with the plaintiff's sister and had two children by her.

A decree of divorce with costs was granted, plaintiff to have the custody of the minor child.

SERRURIER V. SERRURIER.

This was an action for divorce by the plaintiff on the ground of her husband's adultery.

Mr. Jones appeared for the plaintiff.

Defendant admitted the marriage.

Mrs. Rachael Serrurier said she was married to her husband at Port Elizabeth, soon afterwards removing to Cape Town. They were happy for a year, and then he began to stay out at night. She remonstrated and he retaliated with blows. She continued to live with him, and then they removed to Port Elizabeth again, and he repeated his ill-treatment. She left him and came to town, and he followed, and they made it up again. After living at Prince Albert and again in Cape Town they finally parted. In 1888 she heard he was living with a woman named Jubilee, and she came to town from Port Elizabeth and found the facts were as she had been told, the woman living as Mrs. Serrurier. She had taxed her husband with his adultery and he had admitted it. There were no children of the marriage.

Mrs. Dora Smith, Wicht-street, said about two years ago she lived in the same house as defendant, who was the landlord. A woman named Jubilee lived with defendant as his wife.

A decree of divorce with costs was granted.

ROTHENBURG V. ROTHENBURG.

This was an action for divorce, on account of defendant's adultery.

Mr. Benjamin appeared for the plaintiff.

Defendant admitted the marriage.

The plaintiff's affidavit stated the parties were married in Hamburg, and that there were four children of the marriage.

Susannah Elizabeth Partridge said that in May, 1894, a woman named Mrs. Davis lived at her house in Roeland Villas as a lodger. Defendant used to visit her very frequently, at all hours of the day, staying often till after midnight. On one occasion, at midday, she looked through the keyhole, and found the two in bed together. She turned the woman out of the house, and learned that she went and stayed at defendant's house.

Defendant cross-examined witness, contending that it was impossible to see the bed from the keyhole, as there was a screen intervening.

Zeekman Rothenburg, a son of the defendant, said the portrait of the woman that Mrs. Partridge had found in adultery with the defendant was not his mother. His parents had never lived happily together. His father's dirty mode of life nobody could put up with. When there were rows it was never his mother's fault.

Defendant said his wife came to Cape Town in 1885, and deserted him soon after for three days and nights. A little time after she left him for good. By her desertion he contended she had sacrificed all her rights to bring an action for divorce. He admitted that Mrs. Davis had lived at his house as housekeeper since she was divorced from her husband last year.

A decree of divorce was granted with costs.

The Chief Justice said: The defendant's wife, it is true, deserted him, but he gave her cause, and having given her cause, he was not justified in committing adultery.

**Re UNION BANK IN LIQUIDATION. { 1895.
Aug. 31st.**

The Attorney-General (Mr. Schreiner, Q.C.), presented the following report:

The official liquidators beg to submit to this Honourable Court their sixth report. Since filing their last report the sum awarded to creditors and remaining unclaimed, which then stood at £120 19s., has been further reduced to £20 1s. 3d. In terms of the order granted by your Honourable Court, the liquidators have from time to time made refunds to the contributors who have paid in full and amounting in all, at 31st July last, to £37 per shares on 1,432 shares. The original estimate of the liquidators was £30 to £35 per share, which has already been exceeded owing chiefly to the realisation, favourably, of many parcels of gold-mining shares, which when the bank failed, and for two or three years after, were absolutely unsaleable. These realisations and the recovery of certain claims from debtors whose position has materially improved from similar causes leads the liquidators to hope that they may be able to return a further £10 to £15 per share, or, say, a total of £47 to £53, which, however, is likely to spread over some considerable time yet, as by far the greater portion of funds required to fulfil this estimate will be derived from payments to be received from debtors and contributors who have agreed, with the sanction of your Honourable Court, to liquidate their engagement by periodical payments. The liquidators annex hereto a further account, showing in tabulated form receipts and payments to 31st July, 1895. This account has been further

amplified by showing in separate columns the receipts and payments for the period covered by the accounts previously filed with the view of enabling your Honourable Court to ascertain the progress of the liquidation without the necessity of further reference. The list of contributories who have paid their calls in full as confirmed by your Honourable Court represented a total of 1,313 shares, and acting on the authority already granted, the liquidators, in their fifth report, stated they had added to that list five shares. They have since added thereto the names of the following, who have discharged their obligations, viz.: Godfrey Sichel, 100 shares; David Thompson, sen., fourteen shares, (114 shares), making the total of 1,432 shares on which refunds have been paid as above stated. It will be seen that the liquidators have kept the expense of liquidation within the same economical limits as before.

The following is the fourth account rendered by the official liquidators, showing result of their transactions for the twelve months ended July 31, 1895.

To cash	£51,705	8	1
Assets collected	293,928	2	0
Calls collected	456,446	7	8
Amounts received in trust ...	11,991	12	4
Collections	158,067	6	11
Damages recovered from C. T. Vos	4,965	0	0
Unclaimed balances	540	7	3
Earnings in liquidation ...	7,262	9	10
	£987,836	14	1
By Cape of Good Hope Bank ...	£314	16	8
Amounts set off	10,731	9	2
Amounts received in trust ...	11,948	11	11
Standard Bank secured account	201,458	5	11
Dividends paid	663,091	0	3
Interest paid to depositors ...	30,208	19	7
Refunds to shareholders ...	52,984	0	0
Costs in liquidation	15,014	19	3
Payments to protect securities	1,365	3	8
Interest in liquidation	46	13	0
	£987,158	19	7
Balance	£677	14	6

The Court confirmed the report.

**Re WORCESTER COMMERCIAL BANK, { 1895.
IN LIQUIDATION. { Aug. 31st.**

Mr. Benjamin presented the following report:

The official liquidators beg to submit to your Honourable Court their first and final report on the affairs of the abovementioned bank.

1. They have been appointed official liquidators by your Honourable Court by order dated 12th December, 1894.

2. On the day of the date of the said order the only liability of the said bank consisted of outstanding bank notes to the amount of £295, whilst the assets which remained over from the voluntary liquidation of the said bank for realisation consisted of a debt of £783 2s. 10d. owing by the Cape of Good Hope Bank, and 450 shares in the African Banking Corporation (Limited), on which £5 per share had been endorsed as paid up, and which represented a ledger value, in the books of the bank in liquidation, of £322 7s. 6d.

3. Your Honourable Court having fixed the last day of the month of February last past as the last day on which bank notes or other claims against the said Worcester Commercial Bank could be proved, your liquidators have to report that no claims of any nature were received up to that date, nor have any been received since that date, and the amount of bank notes—namely, £295 sterling, has accordingly been written off.

4. On account of the claim of £783 2s. 10d. against the Cape of Good Hope Bank, a sum of £542 10s. 4d. has been received as a final dividend from the official liquidators of that bank, leaving a deficiency of £240 12s. 6d., which has accordingly been written off.

5. The shares in the African Banking Corporation (Limited) held by the Worcester Commercial Bank have been disposed of through the agency of a broker at the rate of £2 10s. per share, and the net profit on the ledger value thereof has been £791 7s. 6d.

6. The successive refunds to the shareholders of the said Worcester Commercial Bank declared payable have been duly paid over with the exception of a sum of £373, still unclaimed.

7. After making allowance for the said sum of £373, there remains a sum of £573 16s. 7d. available, out of which a final refund is to be made to shareholders.

8. The number of shares originally issued by the said Worcester Commercial Bank was 2,250. Though having a nominal value of £10 sterling per share, the subscribed capital, as appearing in the books of the said bank, was only £6,935 10s., or at the rate of about £3 1s. 6d. per share. Deducting 176 shares held by the said bank as representing shares abandoned by debtors, or surrendered in insolvency from time to time, the correct number of shares on which a claim for the refunds to shareholders can be made is 2,072. As it will, however, be necessary to reserve a certain sum out of the funds available for distribution to meet the further expenses required by this official liquidation—the expenses from the date of the said order to the

present day having been but £17 8s. 4d.—Your liquidators would suggest that a final refund of 5s. per share be declared payable on the confirmation of this report, leaving the balance in the hands of liquidators, out of which to meet such expenses as may be necessary, in order to comply with the exigencies of the said Companies Act of 1892, and such further directions as your lordships may issue.

9. With regard to the services rendered by your official liquidators since their appointment as such by your Honourable Court, they have brought up no claim in respect thereof, in view of a resolution passed by the shareholders in general meeting, prior to the placing of the said bank under official liquidation, in terms of the Companies Act of 1892, that after that meeting the (then “voluntary”) liquidators should have no right to claim any further remuneration.

10. Your liquidators may be permitted to briefly refer to the course of the voluntary liquidation.

The said bank was placed under voluntary liquidation on the 15th February, 1892, consequent on the sale of the bank's premises and goodwill to the African Banking Corporation (Limited).

The assets consisted of :

Cash on hand and with agencies	£30,195	11	1
Bills, notes, accounts, overdrawn	37,696	17	10
Mortgage bonds	14,857	10	0
Bank premises and other landed property	3,141	5	9
Cape of Good Hope Bank ...	3,136	5	1
Sundry securities, &c. ...	1,061	18	7
	£90,089	8	4

And the liabilities consisted of :

Notes in circulation	£5,545	0	0
Fixed and floating deposits ...	60,742	8	1
Paid-up capital and reserve fund	21,000	0	0
Profit and loss	2,802	0	3
	£90,089	8	4

The losses sustained in the realisation of the assets, inclusive of a sum of £240 12s. 6d. sustained through the liquidation of the Cape of Good Hope Bank, are £1,312 12s., whilst the total costs attendant on the liquidation to the present day, inclusive of the sum of £1,200 received by the liquidators by way of remuneration for their services, are £1,410 18s. 4d. The cost of liquidation has, therefore, been equal to 1.56 per cent. of the total assets, or, after deducting the cash balances and losses, 2.406 of the assets realised. The total refund to shareholders has been at the rate of £10 sterling per share.

11. Your liquidators have, in conclusion, apply to your Honourable Court for an order

respect of the following: (a) To confirm the first and final report of your liquidators; (b) to fix the rate per share of the final refund to shareholders; (c) to give instructions with reference to the disposal of the balance unappropriated; (d) to fix a date on which all unclaimed dividends to shareholders shall be deposited with the Master of this Court; (e) to give directions as to the disposal of all books, papers, documents of the bank and the liquidation; (f) to order that the company be dissolved; (g) to release the said company from all further liability; (h) to make such further or other order as to your Honourable Court may seem fit.

The Court made the usual order as to the report lying open for inspection and as to advertising.

On the 14th October the report was confirmed.

The Chief Justice said: The only difficulty in this case is the small amount of surplus, and if the liquidators had been ordinary official liquidators and had not stated in their report that they did not intend to claim anything in respect of their services, I think the surplus might have been handed over to them; seeing, however, that they have made that statement, I think that the surplus should be refunded to shareholders. The Court will grant the order as prayed and fix the final refund per share at 5s. at least; the 30th November will be the day on which all unclaimed dividends shall be deposited with the Master, and 31st December the day on which all papers can be destroyed. The rest of the order falls under the general confirmation of the report.

[Attorneys, Messrs. Van Zyl & Buissinné.]

Re CAPE OF GOOD HOPE BANK, IN LIQUIDATION. 1895.
Aug. 15th.
„ 31st.

The Attorney-General, Mr. Schreiner, Q.C., moved for the confirmation of the eighth and final report of the liquidators, which was presented on the 15th August last.

The report was as follows:

The official liquidators beg to submit to your Honourable Court their eighth and final report, and are pleased to be able to state that they exceeded the amount of the final dividend, estimated in their seventh report, dated the 11th October, 1894, at about 9d. in the £ by 1½d. in the £ making a total distribution of 19s. 7½d. in the £ to all creditors whose claims were admitted.

2. At the commencement of the liquidation, the liabilities were £2,152,277; after adjustment owing to set-offs and staff claims, they stood at £2,049,599 17s. 11d. Of these £2,040,400 7s. 1d.

have been claimed, and dividends amounting to £2,001,028 18s. 11d. have been declared thereon, leaving a deficiency of £89,371 8s. 2d. As regards the liabilities, unclaimed bank-notes represent £6,022 10s.; drafts issued, £177 19s. 7d., and current accounts, £2,999 1s. 3d. In terms of your order of the 8th November, 1894, no claims have been admitted since the 31st December last.

3. On the 12th March last your Honourable Court directed that the books, documents, and papers of the Cape of Good Hope Bank (Limited) should be destroyed, and that all dividends unclaimed at the 31st July, 1895, should be handed over to the Master. Your liquidators now beg to report that the destruction of the books and other documents has been carried out, except certain which have been required for use since the granting of that order and as regards the unclaimed dividends, they will be handed over as soon as possible, but owing to the great number of the same, about 2,060, to the value of £5,999 10s. 4d., it may be a few days before that can be done.

4. Your liquidators beg to draw the attention of your Honourable Court to the summary of accounts attached to this report, from which it will be seen that the total amount received is £2,106,750 8s. 7d.; of this amount your liquidators have paid £2,001,028 18s. 11d. to creditors, £6,571 3s. 7d. to protect debtors' securities, by taking up rights, &c. (which has resulted satisfactorily in every case), and £80,833 4s. 2d. for amounts received in trust. The costs of the liquidation amount to £65,783 17s. 5d. It will thus be seen that of the total net amount received 96·44 per cent. has been returned to creditors, 3·17 per cent. has been the cost of the liquidation, and 0·99 per cent. represents refunds to "B" contributories, loss on defaced coin, cash in hand, and amount paid on behalf of debtors. Taking into account the fact that in addition to the head office there were nine branches in the Colony, four in the Transvaal, and one in London, the heavy expenses in connection with the liquidation in the Transvaal, and the time taken, practically five years, your liquidators are not aware of the liquidation of any institution of similar magnitude which has been effected at so low a cost. Your liquidators would further draw attention to the fact that from interest and commission charged on debtors' accounts, and from interest on amounts placed from time to time on fixed deposit, the sum of £43,764 7s. 9d. has been earned during the liquidation, and from the sale of the Nooitgedacht property and the quarter-share in the Wesselson mine profits have been made to the amount of £18,534 18s. 10d.

5. About five months ago your liquidators had to decide on the amount of the final dividend, and at the same time to make provision for all costs to the completion of the liquidation. This has resulted in there being, subject to the costs in connection with the presentation of this report, and to the addition of the proceeds of realisation of office furniture, valued at about £25, a balance in hand of £458 8s. 10d. As to the disposal of this indivisible balance—about 068 of one penny in the £ to creditors, your liquidators beg to ask for the instructions of your Honourable Court.

6. With this report your liquidators beg to present to your Honourable Court the second and final account, from March 1, 1891, to this date.

7. Your liquidators desire at the close of their labours to record for the purpose of future reference their unanimous testimony to the efficient and zealous manner in which they have been aided by the late staff of the bank, and especially would record their sense of the invaluable services which have been rendered by Mr. Clement Davies, their secretary and accountant, for the last four years, up to the close

of the liquidation. They can strongly recommend him as an able and trustworthy officer, well qualified to be entrusted with the conduct of affairs requiring discretion and involving responsibility.

8. Your liquidators beg respectfully to solicit an order from your Honourable Court:

(a) To confirm the second and final liquidation account.

(b) As to the disposal of the cash balance.

(c) As to the disposal of sundry articles now in their possession, which were deposited for safe keeping by customers of the late bank, and concerning which advertisements have been inserted in the daily papers.

(d) In terms of section 40 of Act No. 12 of 1868 as to the disposal of the books, accounts, and documents of the liquidation.

(e) In terms of section 30 of the same Act to dissolve the company.

(f) For their release from further liability.

(Signed) H. J. FELTHAM, {
DAVID MUDIE, { Official
HARRY BOLUS, { Liquidators.

Cape Town, August 21, 1895.

The following is the summary of accounts:

				RECEIPTS.		
To cash in possession of bank at time of stoppage	...	...	...	...	£207,778	16 11
To debtors	...	...	...	...	1,419,016	12 10
To calls on shares—						
A contributories	...	...	...	...	£347,128	2 11
B contributories	...	...	...	...	5,647	17 7
					352,776	0 6
To interest and commission charged on debtors' accounts and interest on fixed deposits...	...	...	...	...	43,764	7 9
To interest on calls on shares	...	...	...	...	2,347	12 1
To bank premises	...	...	...	...	30,698	15 6
To profit on Nootgedacht property being—						
Forfeit for non-purchase	...	...	...	...	£300	0 0
Purchase price...	...	...	...	...	25,000	0 0
Interest on instalments	...	...	...	...	670	13 4
					25,970	13 4
Less—						
Debt and interest due by Nootgedacht Gold-mining Company (Limited) ...	£14,150	7	8			
Expenses including costs of liquidation of Nootgedacht Gold-mining Company (Limited), licences on claims, law charges, insurances, caretaker's salary, and commission on sale of property ...	4,285	7	3		18,435	14 6
					7,534	18 10
To surplus realised on sale of quarter share in the cession by J. J. Wessels to H. A. Ward of the right to acquire the farms Oliphantsfontein and Benaudhuidsfon- tein, purchased from S. H. Coronel on 12th day of February, 1891	...	...	...	...	£11,000	0 0
To trust account	...	...	...	...	30,833	4 2
					£2,105,750	8 7

PAYMENTS

[illegible]

(Signed)

H. J. FELTHAM,
DAVID MUDIE,
HARRY BOLUS,

**Official liquidators
of the
Cape of Good Hope Bank (Ltd.)**

The Attorney-General also asked for the direction of the Court as to the acceptance by the liquidators of an offer of £22 2s. for cession of claim against the insolvent estate of Mohammed Ismail & Co. The estate was reported to be absolutely worthless, and the liquidators have satisfied themselves on that point.

In confirming the report the Chief Justice said: Before parting with this estate I must express the high appreciation of the Court of the great assistance which the liquidators have always rendered to the Court in the liquidation of the bank. Their reports have always been clear and to the point, and have always assisted the Court materially in deciding the different points which came before the Court for decision. I am certain also that the creditors of the bank must feel grateful to the liquidators for the manner in which they have performed their duties. The cost of adminis-

tration considering the enormous sum at stake has been very low indeed. In regard to the matter more particularly before us the Court will as prayed confirm the second and final liquidation account. Seeing that the cost of administration has been very low, I think it only right that the balance in hand—£458—which cannot be of any particular benefit to the creditors, should now be paid to the liquidators. Of the £458 we think £100 should be awarded to each of the liquidators, and the balance distributed amongst the staff as the liquidators may think best. In regard to the disposal of the sundry articles deposited for safe keeping, the solution suggested appears to be the best; that is, leave them with the safe in which they are kept to the attorneys to the liquidators, to be kept until a further order of the Court, with leave to the attorneys to deliver them to persons who establish their title to them. With

regard to the books, accounts, and documents of the liquidation, the best course will be to destroy them. We will in connection with this other prayer make an order to dissolve the company. There is no necessity to release the liquidators from further liability, besides it is rather dangerous to make such an order in view of the precedent set up. Of course there can be no release, for, if there has been maladministration, the creditors would have a right to sue. There has been no question of maladministration, nor can such a one arise in this case, but there might at future times be cases of maladministration, and then a previous release by the Court from further liability might lead to the belief that liquidators could not be sued. For fear, therefore, of establishing such a precedent, we cannot make an order of release from further liability. Naturally, of course, they are released unless there has been a breach of trust—of which there can be no fear. The liquidators will have sufficient money in the bank to meet the cheques, the Court reserving to the Master the right hereafter to take the place of the liquidators and call upon the bank to pay over to him any moneys not claimed.

The Court will authorise the liquidators to accept the £2 2s. offered for the cession of claim against the insolvent estate of Mohammed Ismail & Co.

[Attorneys for the liquidators, J. & H. Reid & Nephew.]

BREWIS v. SCOTT. { 1895.
Sept. 2nd.

Interdict—Trespass — Agent verbally appointed.

The Court, on the application of an agent, verbally appointed by his principal, who was in England at the date of the application granted an interdict restraining trespass and other injuries to land.

This was an application for an interdict by George Brewis, of London.

The petition set forth that on the 11th July, 1895, the petitioner purchased from William Scott and Georgd A. Scott, trading together in Cape Town under the style or firm of W. and G. Scott, a certain piece of land at the foot of the Lion's Head in Cape Town, that he had received transfer and entered into possession.

The agreement of purchase was to the effect that transfer was to be taken, possession given, and the purchase price paid on 11th August, 1895, but it was agreed that if W. and G. Scott were unable to complete the removal of the buildings and other movable property, owned

by them and on the land, by the 11th August, another month should be allowed them to complete the removal.

That the petitioner further informed Mr. G. A. Scott that he had no present intention of using the ground and that his firm could arrange for a lease of the same with his agent Mr. A. L. Caporn, in whose hands he left the matter.

On the same day (11th July, 1895), the petitioner left for England and thereafter on 15th July, 1895, the agent informed Scott that owing to instructions received he would be unable to conclude any lease.

The petitioner alleged that W. and G. Scott took no steps whatever to remove their buildings, erections, and property, though requested to do so, especially by the petitioner's agent on 20th July, to cease brick making; that on the contrary, they went on making bricks until 10th August, and only ceased on that day on receiving a letter from petitioner's attorneys.

That W. and G. Scott further, after being informed that no lease would be entered into, granted a lease of certain grazing rights to one Momssen for a period of two months from that date.

The petitioner further alleged that W. and G. Scott had four or five kilns of burnt bricks, some 50,000 or 60,000 unburnt bricks made in violation of the contract, certain shedding and iron buildings, some of which were occupied by persons from whom they drew rent, and other property still to be removed, yet were doing nothing practically towards effecting such removal.

That the bricks, &c., were causing great inconvenience to the petitioner's agent, and prevented him from obtaining the free and proper use of the ground, and caused loss and damage to his sub-contractor and the servants working under him.

That the petitioner's agent received an intimation that it was the intention of W. and G. Scott to burn the unburnt bricks at present on the property there, and at once caused notice to be given to them that he would take steps to prevent any proceedings other than the actual removal of their property.

That W. and G. Scott have commenced to erect kilns from the unburnt bricks on petitioner's property, and that one of their servants informed petitioner's agent that it was their intention to burn them there.

That the petitioner, his agent and servants had already suffered loss and damage, and would suffer still more should W. and G. Scott be allowed to persist in their wrongful and unlawful acts and proceedings.

The prayer was for an order restraining W. and G. Scott from burning bricks on the petitioner's property or otherwise trespassing upon it, save for the purpose of removing their buildings, bricks, &c., and compelling them to effect such removal not later than 11th September instant.

(This petition was signed A. L. Caporn, Manager Caporn & Co. (Limited), who styled himself agent for G. Brewis, but on the hearing of the application Caporn was unable to produce a power of attorney, although there was evidence to show that Brewis had verbally appointed him his agent. REP.)

For the respondents it was alleged *inter alia* that they ceased making bricks on 8th August. They said that there was only one kiln of burnt bricks on the ground, and that of the unburnt bricks 16,000 were made before the 11th July last, and that the remainder were made from clay prepared prior to that date.

They denied having given a lease, or that they drew rent from the use of the iron buildings and they said that the unburnt bricks were now being stacked in two kilns for the purpose of being burned, that the space occupied by the kilns would not be considerable, and that as soon as the kilns were erected, the sheds, being no longer required, would be removed.

Mr. Juta, Q.C., moved.

Mr. Graham for the respondents, before discussing the merits, objected to the *locus standi* of Caporn to apply for an interdict seeing that he did not hold a power of attorney from Brewis.

The Chief Justice said: In strict law the respondents have no right to burn any bricks moulded by them after they actually gave transfer. If, before giving transfer, they had made it a condition of such transfer that they were to have the right to burn the bricks already moulded by them, then this question could not have arisen; but they give a clean transfer to the applicant, and they now claim the right to remain on the land for the purpose of burning bricks. In strictness they have no right to do that, and therefore the applicant, had he appeared before the Court by power of attorney, would have had a right to the interdict. I have no doubt whatever that Brewis did appoint Mr. Caporn as his agent, but there is the technical difficulty that he did not give Caporn a power of attorney. In my opinion, however, Caporn has sufficient authority to appear before the Court to prevent injury being done to the applicant's land. He is not only the lessee, but also, in the presence of an attorney, was appointed as the applicant's agent,

although without a power of attorney. I am glad Mr. Juta, on behalf of the applicant, has consented now to three weeks being granted to burn the bricks, and on this understanding the Court will grant the interdict as prayed with costs, save and except that the respondents be at liberty to burn the bricks already moulded by them, and that they remove all such bricks within three weeks from this date. The only exception upon the interdict is the burning of the bricks, they can only do what is necessary for that purpose; for the rest they must remove everything.

Mr. Justice Uppington concurred.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bisset; Respondent's Attorneys, Messrs. J. & H. Reid & Nephew.]

LAMPRECHT V. LAMPRECHT'S
TRUSTEE.

1895.
Sept. 2nd.
" 12th.

Trustee—Consent to transfer of land—Right of pre-emption.

Certain land was transferred to four purchasers and a deed of sale was executed and registered with the transfers giving the purchasers inter se certain rights of pre-emption.

Thereafter one of the purchasers became insolvent and his interests in the land were sold for the benefit of his creditors to his trustee, the bond-holder.

Subsequently one of the purchasers with the consent of his co-purchasers, including the insolvent, sold his land to a stranger.

The trustee declined to sign a document consenting to the sale and in consequence the Registrar of Deeds refused to pass transfer.

On application being made to the Court for an order compelling the trustee to consent, a rule nisi was granted calling upon him to show cause why the Registrar of Deeds should not be authorised to allow transfer, without his consent, either individually or in his capacity, and on the return day the rule was made absolute with costs de bonis propriis against the trustee.

This was an application on notice to the respondent that the Court would be applied to for an order calling upon him to show cause why he should not sign the necessary consent paper, in his capacity as trustee, to transfer being effected from the applicant to one

McIntyre of certain 10-224 parts in the farm Brakfontein, in the division of George, and upon which farm the insolvent estate of J. C. G. H. Lamprecht (the applicant's brother) has a certain right of pre-emption under the deed of sale dated 17th August, 1878, or to show cause why he should not sign such consent paper as aforesaid, and pay the costs of the application.

The facts are as follows:

The petitioner is the registered owner of certain 33-224 parts or shares in certain piece of land called "Brakfontein" in the division of George, which was conveyed to him with other property by one Dirk Lamprecht by deed of transfer dated 17th April, 1879. Attached to the deed of transfer is a certain deed of sale entered into on 17th August, 1878, by and between the said said Dirk Lamprecht, as seller, and J. C. G. H. Lamprecht (the insolvent), H. Lamprecht, C. J. E. Gerber, J. S. Gericke, and the petitioner (D. M. Lamprecht); as purchasers giving to them certain rights of pre-emption.

The petitioner recently sold to one McIntyre, of George, certain 10-224 parts or shares in the farm, and was now desirous of giving transfer, all the parties to the deed of pre-emption having given their consent, including the insolvent.

Previous to 1892, J. C. G. H. Lamprecht's estate was surrendered as insolvent, the respondent was appointed sole trustee, and the first and final liquidation account was confirmed on 26th January, 1892.

The petitioner applied to the respondent on the 2nd May last for his written consent to the transfer, which up to the date of the application had not been given.

The applicant alleged that though the respondent had not complied with his request he had not refused, but stated that he could not give the petitioner a definite answer until he knew whether the petitioner would be willing to enter into an agreement with him for the exchange of certain property mentioned in the deed of sale, thus making the consent required of him in his representative capacity dependent on an agreement being arrived at for his individual benefit.

In consequence of the respondent's refusal to sign the consent the Registrar of Deeds refused to allow the transfer to go through, in consequence of which the petitioner alleged that he had suffered considerable trouble and expense, and was unable to complete transfer of the property to McIntyre though called upon by him to do so.

The prayer was for an order calling upon the trustee to sign the necessary consent paper in

his capacity as trustee or to show cause why he should not sign such consent paper and pay the costs of the application.

The respondent, who is the registered owner of that part of the farm which was previously the property of the insolvent, having bought it in his estate, alleged that he declined to give his consent: (1) because he had been advised that it was neither necessary nor competent for him as trustee, or in his individual capacity, to sign such consent, inasmuch as he was now the owner of the insolvent's interests in the farm, but was not one of the purchasers to whom the conditions and restrictions in the agreement of sale and purchase apply; and (2) that if in purchasing the property he was in the same position as the original purchasers named in the agreement then he was entitled to have the property sold to McIntyre first offered to him (respondent). The pre-emption clause in the deed of sale, in view of which the Registrar of Deeds refused to pass the transfer without the respondent's consent as trustee, was in the following terms:

It is further agreed between the parties hereinbefore mentioned that in case one or more of the purchasers shall feel disposed to sell his or their share of the ground, he or they shall be bound to sell to the other of the purchasers, and that for the sum of £1 10s. per morgen, without taking into account any buildings or improvements.

Mr. Sheil was heard in support of the application.

Mr. Juta, Q.C., for the respondent.

The Court granted a rule nisi, calling upon the respondent to show cause on 12th September next why the Registrar of Deeds should not be authorised to allow transfer of the share in the farm in question, without the consent of the respondent, either as trustee or in his individual capacity, and why he should not pay the costs of the application. Copy of the rule to be served on the Registrar of Deeds.

On the return day of the rule, applicant to furnish information on oath as to whether the respondent, before transferring the insolvent's share, offered it for sale to the applicant.

* * * * *

On the return day (12th September) the applicant's affidavit was read. He alleged that the respondent had not offered the insolvent's share of the farm to him before transferring it to himself, that he had received no notice of the sale, nor was he asked for his consent, nor was he approached in any way in regard to the sale.

Mr. Shell for the applicant, now moved that the rule granted on the 2nd September should be made absolute.

Mr. Juta, Q.C., appeared for the respondent and read his affidavit showing cause against the rule. It alleged *inter alia* that each of the purchasers referred to in the deed of sale had due notice of the sale in the insolvent estate, and that none of them raised any objection to it or claimed a right of pre-emption by virtue of the deed of sale. That the applicant had not offered him (respondent) the land which he had sold to McIntyre, and that he wished and was still willing to purchase the ground sold to McIntyre at the price stated in the deed of sale, viz., £1 10s. per morgen.

The Court made the rule absolute with costs *de bonis propriis* against the respondent.

The Chief Justice said: I am by no means satisfied that the original form of motion was not a proper one, seeing that the Registrar of Deeds refused to pass transfer without the respondent's signature. In my opinion it is not only the duty of a trustee to do everything necessary for the administration of the estate, but also everything collateral to the administration of the estate. It is quite evident that the trustee in this case merely refused to give his formal sanction because he wished to serve his own private ends. But as there might have been some difficulty about the form of the order, the Court thought it better on the last occasion that a rule nisi should be given, in order that the matter might be made perfectly clear, and an alternative was allowed to the trustee to sign the necessary papers, which course would have enabled the applicant to obtain what he wanted without coming again to the Court to apply for the commitment of the respondent for contempt of Court. As I said before, I am by no means satisfied that the original motion was not one which could be made against a person occupying the position of the respondent in the present case. On the first application the Court was led to suppose that the trustee might have had a claim that the property should first of all have been offered to him for sale before the applicant could sell it. Well, Mr. Juta was bound to admit now that the trustee had no such claim. Whatever rights the original parties to the agreement may have had, when once the transfer had been made the transferee had no such rights as the original parties to the agreement had; and therefore that defence falls to the ground, and in my opinion this was the only defence which could possibly assist the trustee in his refusal to sign the consent in accordance with the original reasonable

demand made by the applicant. A letter was written to him on the 2nd May, in which it was explained that the reason why the consent was asked was because the Registrar of Deeds insisted upon it. Well, what is the answer? It does not matter who sent the answer, whether it was the respondent's attorney or the respondent himself, for if it was the attorney, he must have sent it on behalf of the trustee. The answer is, "Do you want my signature in my capacity as trustee, or in my individual capacity?" Of course he had been asked for it in his capacity as trustee, and in that capacity he was asked for it again. In my opinion the respondent's reply to the applicant's letter of the 2nd May was a mere quibble, and the Court would have been quite justified in giving an order with costs on the original application, and now that the rule is made absolute it must be with costs *de bonis propriis*.

[Applicant's Attorney, D. Tennant, jun.; Respondent's Attorneys, Messrs. Tredgold, McIntyre & Bisset.]

— — —
 OUDTSHOORN MUNICIPALITY V. { 1895.
 LIND. { Sept. 2nd.

Mr. Juta, Q.C., applied for an order restraining respondent from issuing licences or permits for removing clay and soil from, and making bricks and quarrying stone on, the remaining extents of the farms Hartebeeste River and Grobbelaar's River, otherwise known as the Oudtshoorn Commonage, pending an action for a declaration of rights.

Mr. Graham for the respondent.

The Chief Justice said: The respondent undertaking not to issue any fresh permits, or to allow new quarries to be opened, and to keep a true account of all sums received by him in respect of such permits pending the decision of the action already commenced; no order upon this application will be made. The question as to the applicant's rights to an interdict against the respondent to be raised by claim in reconvention. The costs of this application to be costs in the cause.

SUPREME COURT.

**[Before Sir HENRY DE VILLIERS, K.C.M.G..
(Chief Justice).]**

PROVISIONAL ROLL.

VAN DER MERWE V. G. & LE ROUX. { 1895.
Sept. 12th.

Mr. Buchanan moved for provisional sentence for the sum of \$70 on a promissory note.—Provisional sentence was granted as prayed.

JAGGER AND CO. V. L. LEVI

**Mr. Benjamin applied for the final adjudication of the respondent's estate.
The order was granted.**

STANDARD BANK V. MARAIS. } 1895.
Sept. 12th.

**Provisional sentence — Promissory note —
Negotiable instrument — Indorsement —
Cession.**

The defendant, being the maker of a note, whereby he promised to pay to B. or order the sum of £55, the amount to be deducted from another note made by B. in his favour and payable at the same date, was sued on the note for provisional sentence by the Standard Bank, which claimed to be the legal holder by virtue of B.'s blank endorsement.

Held (1) that the note, not being an unconditional promise to pay, was not a promissory note and (2) that the note, not being a negotiable instrument, could not be ceded merely by the payee's indorsement in blank so as to found a provisional claim in favour of the bank as holder.

Mr. Schreiner, Q.C., A.G., moved for provisional sentence on the following promissory note.

Due 27th March, 1894.
Graaff-Reinet, 9th Dec., 1893.

£55 0ⁿ. 0^d.

On the 27th day of March, 1894, next, I promise to pay to the order of Mr. J. P. Marais, at the office of the Standard Bank, Murraysburg the sum of fifty-five pounds sterling. Above amount to be deducted from bill passed by J. P. Burger in J. F. Marais' favour, due 27th March, 1894.

For value received.

J. F. Marais.

The note was endorsed—J. P. Burger, but above the endorsement the words—"Pay the Standard Bank of South Africa, Limited., or order," were erased.

On the back of the note appeared the following special endorsement: "I hereby accept notice of dishonour of within P/N and promise to pay the same on demand with interest and costs.

"(Signed) J. P. BURGER"

The defendant in his affidavit in defence alleged that on the 27th November, 1893, Burger passed a promissory note to him for \$65, for which value was given to Burger.

That thereafter he (defendant) passed the promissory note to one P. Minnaar.

That after maturity of the note he (defendant) was sued by Minnaar and the Standard Bank of Murraysburg, but was absolved from liability as an endorser thereof for want of its being duly noted on him.

That before the promissory note became due he and Burger had further transactions, for which he passed to Burger the promissory note for \$55 now sued on, which note fell due on 27th March, 1894, the same day on which the first mentioned promissory note passed by Burger to defendant fell due.

That the promissory note passed by him to Burger was made conditionally, the condition being, not that he (defendant) should take up the £55 promissory note but that it should be deducted from the £65 promissory note when it matured.

He alleged that Burger had not paid the \$65 promissory note nor had the \$55 promissory note been deducted therefrom as provided.

That he was therefore liable for the full payment of the £65 promissory note made by Burger in his favour, and would have had to pay the amount thereof but for the neglect of the bank in not having the same duly noted on him as endorser.

That in December, 1894, some time after he had been sued for the \$65 promissory note he went to the Standard Bank at Murrysburg at the request of the plaintiff, who said that he would be very much pleased if defendant would do something towards the payment of the \$65 promissory note, and if he did, the bank would think much of him which might be of use to him thereafter.

That he thereupon told the plaintiff that he would not like to give anything if it would make him liable for the promissory note, to which the plaintiff replied, "Oh no, it will only be to show your honour to the bank."

That he then told the plaintiff that he had a self-binding reaping machine, which he might

have by sending for it to a farm called Doornbosch, in the district of Murraysburg, and for which he had given P. Minnaar £45. The plaintiff was very pleased and agreed to send for the machine, and as he (defendant) was leaving Murraysburg for Klipdam, the plaintiff begged him to give him a written acknowledgment* to the effect that he had given the machine to the plaintiff, and so that the owner of the farm might deliver the machine.

The plaintiff in his answering affidavit, after referring to the circumstances under which the £65 promissory note came into the possession of the bank, alleged that at the time of the cession of the reaping machine he had no knowledge of the promissory note for £55.

That on the 6th July, 1895, he sold the machine for £10, the highest price which he could obtain for it, which amount was placed to credit in part payment of the note for £65.

That after the endorsers of the note (defendant and Minnaar) had been absolved from liability he requested the maker, Burger, to make provision for the same.

That on the 11th February, 1895, he ascertained from the manager of the Graaff-Reinet branch of the bank that Burger had informed him that he was unable to pay the promissory note for £65, but that he had handed over the promissory note for £55, stating that any moneys recovered from Marais were to go in reduction of the £65 promissory note so provided in the special condition.

Burger then endorsed the note to the bank, and it was transmitted by the manager of the Graaff-Reinet branch to the plaintiff.

Up to the date of the present proceedings Burger had not paid anything on account of the £65 promissory note.

Mr. Benjamin for the defendant: It is submitted that the document sued on is not a promissory note, inasmuch as it is not an unconditional promise to pay. See Act 19 of 1893, section 82; *Chitty on Bills* p. 93; *Davies v. Wilkinson* (10 A. and E., 98); *Reitz v. Koch* (1 Menz., 56).

There has been no completed cession by Burger to the plaintiff, or if there has been, it does not appear *ex facie* on the document, and therefore provisional sentence cannot be granted on it without oral evidence. *Le Roux v. De Villiers* (Buch. 1869, p. 90).

Mr. Schreiner, Q.C., A.G.: The note is an unconditional promise to pay.

* This acknowledgment, as it was called in the affidavit, was really a cession of the machine in favour of the plaintiff and gave power to sell. REP.

Provisional sentence has been granted on similar documents. See *Letterstedt v. Watney* (1 Menz., 16), and cases there cited.

The condition in the document was purified by the escape of the defendant from liability on the £65 promissory note under Act 19 of 1893, section 49. The defence raised has been purely technical. There has been no attempt at a defence on the merits.

As to there being no cession *ex facie* on the document the endorsement is sufficient. See *Wright & Co. v. Colonial Government* (8 Juta, 260).

Mr. Benjamin in reply.

The Court refused provisional sentence.

De Villiers, C. J.: It is impossible to treat the document, on which provisional sentence is asked for, as a promissory note. The defendant, as maker, promises to pay Burger or order the sum of £55, but with this condition, that the amount is to be deducted from the amount of another note of £65 made by Burger in favour of the defendant and falling due on the same day. It is not, therefore, an unconditional promise in writing in terms of the 82nd section of Act 19 of 1893. The note in suit was endorsed by Burger. Above his endorsement the words "Pay to the Standard Bank or order" were first written and then erased. If these words had remained, there might have been some ground for holding that a cession appears on the note itself to have been made to the bank. The erasure of the words leaves the document with a blank endorsement. Such a blank endorsement on a non-negotiable instrument does not amount to a cession of the original payee's rights, so as to enable the holder to sue on it without proof of cession to him: *Reitz v. Koch* (1 Menz., 56). Oral proof of such cession may be given but the fact that oral proof is required shows that this is not a case for provisional sentence. It is clear that even if there had been a due cession of the note, the bank would have had no greater rights in respect thereof against the defendant than Burger the cedent has. Upon the evidence as it stands it is by no means clear that Burger would have had an action on the note for £55 against the defendant, and the existence of a doubt on this point is another reason why the case should not be decided without further evidence.

Provisional sentence must be refused and the plaintiff directed to proceed in the principal case. Costs to abide the result.

[Plaintiff's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendant's Attorneys Messrs. Van Zyl & Buissinné.]

BARRY'S EXECUTORS V. BOSMAN.

Mr. Tredgold applied for provisional sentence for the sums of £55 and £24 4s. 2d., being interest at 6 per cent. per annum on two bonds. Sentence was granted as prayed.

MITCHELL AND CO. V. MOCKE.

Mr. Buchanan applied for provisional sentence for the sums of £115 5s. and £113 5s. on two promissory notes. Granted.

HELFRICK'S EXECUTORS V. STEYN.

Mr. Joubert applied for provisional sentence for the sum of £52 on a mortgage bond. Granted.

BOSMAN AND CO. V. PEASE.

Mr. Benjamin applied for provisional sentence for the sums of £25 6s. 9d. and £11 3s. 3d. on two bills of exchange. Granted.

SIEBERHAGEN V. ALBERTYN.

Mr. Maskew applied for provisional sentence for, £150 on a mortgage bond, and for the property hypothecated to be made executable. Granted.

CHRISTIE'S TRUSTEE V. VAN DER SPUY.

Mr. Maskew applied for provisional sentence for £300 on a mortgage bond, together with interest at 7 per cent. Granted.

ENGELBRECHT V. BOTHA. { 1895.
{ Sept. 12th.

Rule 36—Notice.

Where it is intended to apply to have property declared executable under Ru'e 36, notice of the application should be given to the defendant.

Mr. Close applied for provisional sentence for £200 on a promissory note, and for certain immovable property to be made executable under rule 36. Formal notice had not been given to the defendant, but his solicitors were cognisant that the application under rule 36 would be made.

The Chief Justice, in granting provisional sentence and the order declaring the immovable property executable, said: The property has been attached under a previous order, but it

must be understood that applications of this kind will not be granted as a matter of course due notice must be given to the defendant that the application will be made.

MACLEOD V. GEDYE.

Mr. Buchanan applied for provisional sentence for the sum of £500 on a promissory note. Granted.

HAND AND CO. V. LOTZE.

Mr. Tredgold applied under rule 329 for judgment for the sum of £32 9s. 6d. Granted.

GORDON AND GOTCH V. KNIGHT.

Mr. Close applied under rule 329 for judgment for the sum of £70, less £20 14s. and £1 16s. Granted.

GLAISER'S EXECUTORS V. QUINN'S EXECUTORS.

Mr. Molteno moved under rule 319 for judgment for an account and for costs *de bonis propriis*. The defendants had been barred.

The Court gave judgment as prayed, the account to be filed within fourteen days, failing which the defendants to pay to the plaintiffs the sum of £60.

***Ex parte* NICHOLAS FREDERICK HODGSON.**

Mr. Close moved for the admission of the applicant as an attorney and notary of the Supreme Court.

The application was granted, the oath to be administered at Fraserburg.

REHABILITATIONS.***Ex parte* GEORGE GRACK.**

Mr. Maskew moved for the rehabilitation of the applicant. Granted.

***Ex parte* WALTER LANE AND HENRY MARRIOTT, TRADING AS W. LANE.**

Mr. Buchanan moved for the rehabilitation of the applicant. Granted.

***Ex parte* JOHANNES PETRUS MARAIS.**

Mr. Stony moved for the rehabilitation of the applicant. Granted.

Ex parte MARTHINUS JOHANNES DU PLESSIS.

Mr. Smuts moved for the rehabilitation of the applicant.

Granted.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE ANNIE LYDIA VAN WYK.

Mr. Molteno moved for leave to the executors to pass a bond for £200 in favour of Muriella Johanna Pocock, in lieu of the one passed in favour of Herbert John Jennings, and for authority to transact the business of the estate without the assistance of George Boomsina van Wyk, one of the executors.

The order was granted, the regulations of the Deeds Office to be conformed to in regard to the existing bond.

POPPE V. BATE AND CO.

Mr. Juta, Q.C., with Mr. Smuts, moved for a commission to take the evidence in England, *de bene esse*, of Edward Pierce and such other witnesses as may be produced on behalf of the defendant.

Mr. Benjamin, for the respondent, consented on the condition that cross-examination may be made, and that the respondent also be allowed to take evidence.

The Court granted an order for a joint commission, to be held in London. Mr. Mackarness to be commissioner.

NIGHTINGALE V. WHITE, MULLER } 1895.
AND CO. } Sept. 12th.

Mr. Juta, Q.C., moved for leave to sign judgment against the plaintiff for not proceeding with his action against the defendants within the time fixed by rules of Court.

Mr. Sheil for the defendants.

The order was granted.

The Chief Justice said: The defendants in the principal case insist upon their rights, and the Court must grant them. There is no excuse for the plaintiff not being here to substantiate his claim. The Court must grant the order, with, costs.

THE PETITION OF LEONARD W. VAN OS.

Mr. Molteno moved on behalf of the applicant, a sworn translator of the High Court Pretoria for leave to be examined as a sworn translator of the Supreme Court in the Dutch language.

The Court admitted the applicant as a translator, the oaths to be administered at Vryburg.

IN THE MATTER OF THE MINOR ALEXANDER EDWIN JUDD.

Mr. Castens applied for authority to the Master to pay out from the amount to the credit of the minor in the Guardians' Fund a quarterly allowance, to defray the cost of his maintenance and education.

The order was granted, authorising the Master to pay out the sum of £20 per quarter.

MAGUIRE V. CROFTON.

Mr. Buchanan moved for leave to sign judgment against the plaintiff for not proceeding with the action against the defendant within the time fixed by the rules of Court.

The order was granted with costs.

IN THE ESTATE OF ELSIE CHARLOTTE GERTRUIDA MYBURGH AND SURVIVING SPOUSE.

Mr. Juta, Q.C., moved for authority to raise a further loan of £350 on the farm Welgedacht wherewith to pay liabilities.

The Court granted the order as prayed, the petitioner undertaking to pay £25 annually into the Guardians' Fund for the benefit of the minors until the amount authorised to be borrowed is paid in.

STARK V. STARK.

Mr. Sheil moved for leave to examine plaintiff's witnesses on commission at Johannesburg.

The order was granted, and Mr. De Villiers appointed as commissioner.

GREEN AND ANOTHER V. ORSMOND AND ANOTHER.

Mr. Juta applied for the postponement of hearing until the 12th October.

Mr. Benjamin consented on condition that affidavits be filed by the plaintiff within ten days.

The postponement was granted accordingly.

Ex parte SCHREINER AND SILKE. } 1895.
Re REITZ'S WILL } Sept. 12th.

Executors testamentary — Release from office.

Where the petitioners had been appointed executors testamentary, but not administrators, and had no power of assumption under the will, and the administration of the estate was likely to extend over a considerable period, the Court at their request accepted their resignation and appointed a Trust Company in their place.

This was the petition of William Philip Schreiner and George Baily Silke, the duly appointed executors testamentary of the estate of the late Gysbert Benedictus Reitz.

The petitioner annexed a copy of the will of the deceased, from which it appeared that his mother is entitled to the usufruct of the whole estate with the exception of a small legacy of £50.

The petitioners, though appointed executors, were not appointed administrators, and had no power of assumption under the will.

The assets of the estate consisted of cash, certain shares, not saleable at present, and a bond of £1,500 on certain property in the district of Swellendam.

After paying the debts due by the deceased the petitioner had certain cash in hand, and the above mentioned bond.

They annexed a copy of a full account of their administration, the original of which supported by vouchers had been filed with the Master.

Under the circumstances mentioned the petitioners expressed the opinion that it would be better and more to the interest of the estate that its administration should be by a public company, and they alleged that they had approached some of the Chambers in Cape Town, and had made a provisional arrangement with the Colonial Orphan Chamber and Trust Company, subject to the Court's approval, to administer the estate in terms of the will.

The petitioners prayed that the Court might be pleased to accept their resignation as executors and appoint the secretary of the Colonial Orphan Chamber and Trust Company to be the administrator of the estate.

The heirs under the will consented to the granting of the petitioner's prayer.

Subject to the usufruct in favour of his mother the testator bequeathed two-thirds of his estate to two of his sisters, and the remaining one-third to the children of his third sister, the interest to be paid to her during her lifetime, and the principal at her death to her children.

The administration of the estate would consequently have extended over a very considerable period.

Mr. Sheil was heard in support of the application and relied on *Ex parte Kingsmill and Anderson* (4 Sheil, 100).

The order was granted.

The Chief Justice said: Seeing that the executors were not appointed administrators under the will, and seeing that the administration will probably extend over a long period, it is only fair to relieve the executors and hand over the duties of administration to a Trust Company. The Court will grant an order in terms similar to that in *Ex parte Kingsmill & Anderson* (4 Sheil, 100).

[Petitioner's Attorneys, Messrs. Van Zyl and Buissinné.]

Ex parte BERTRAM. } 1895.
} Sept. 12th.

Curator bonis—Release from office.

Curator bonis of a lunatic relieved from his curatorship on the grounds of his advanced years, bodily ailments, and consequent inability to attend to the affairs of the estate.

This was the petition of Johan Petrus Bertram, of Sterkstroom.

On 13th September, 1886, one James Bell was declared of unsound mind, and the petitioner was appointed curator of his property.

In terms of an order of Court the petitioner paid into the Guardians' Fund all cash in the estate, and from time to time filed with the Master accounts of his administration. All the known assets of the estate had been realised and lodged with the Master, the lunatic's wife and children being maintained by the interest on the capital (£15,000).

The petitioner alleged that owing to his advanced years and bodily ailments, he found that he was no longer able to attend to the affairs of the estate, and was therefore desirous of being relieved of his curatorship, and he stated that he considered Mr. J. W. Kirchner to be a fit and proper person to be appointed his successor.

Mr. Kirchner expressed his willingness to accept the trust, and Mrs. Bell expressed her approval of his being appointed.

Mr. Sheil was heard in support of the application.

The Court granted the order as prayed. The costs of the application to come out of Mr Bell's estate.

[Petitioner's Attorney, A. H. Sinclair,

DIGEST OF CASES.

	PAGE
Adultery—Divorce—Admission—Evidence—Admissibility of record of suit to which defendant was not a party.	
<i>B. sued his wife for divorce on the grounds of her adultery with M.</i>	
<i>B.'s wife in a letter to her husband admitted that she had committed adultery with M.</i>	
<i>At the trial B.'s counsel asked leave to use as evidence the record in a case, in which M.'s wife sued M. for, and obtained, a decree of divorce on the grounds of his adultery with B.'s wife although the latter was not a party to that suit.</i>	
<i>Held, that the record was admissible as evidence against B.'s wife.</i>	
Brookfield v. Brookfield ...	282
Appeal—Time—Extension.	
<i>When an appeal from a Magistrate's judgment has not been prosecuted within the time allowed, good and sufficient cause for the delay must be shown on an application for an extension of time.</i>	
<i>Where therefore there had been considerable delay in prosecuting an appeal, and but little hope of success, the Court refused to grant an extension.</i>	
Green and Fitzgerald v. Bradford ...	268
Appeal to Privy Council—Criminal case—Sections 50 and 51 of Charter of Justice.	
<i>The Governor having by Proclamation condemned and sentenced a Native Chief under the Pondoland Annexation Act the Court ordered his release on the ground that the Proclamation had not the force of law, whereupon the Attorney-General applied for leave to appeal.</i>	

	PAGE
<i>Held, that the proceeding was not a civil suit in terms of the 50th section of the Charter of Justice and that the Court had no power to grant leave to appeal.</i>	
Regina v. Sigcau ...	290
Child—Criminal responsibility—Obedience to father.	
<i>A child under fourteen years of age, who assists his father in committing a crime, is presumed to do so in obedience to his father's orders, and is not punishable, even if he knew that he was doing a forbidden act, unless, in the case of a child above seven, the crime was so heinous as obviously to absolve him from the duty of obedience.</i>	
Regina v. Albert ...	281
Civil Imprisonment—Insolvency.	
<i>The Court refused to grant a decree of civil imprisonment against a defendant who had given notice in the "Gazette" of his intention to surrender.</i>	
Mendelssohn v. Judelsohn ...	256
Commissioner of the Supreme Court—Affidavits—Practice.	
<i>Affidavits made outside the Colony should be sworn to before a Commissioner of the Supreme Court.</i>	
<i>If affidavits are sworn to before a Vrederechter (Justice of the Peace) in the neighbouring Republics his appointment should be authenticated.</i>	
Midland Agency and Trust Co. v. Burger. Ex parte Burger...	261
Company—Deed of Settlement—Alterations.	
<i>The Court ratified certain alterations approved of by the shareholders in</i>	

	PAGE
<i>their deed of settlement and having for their object the enlargement of the company's operations.</i>	
<i>Re Colonial Marine Assurance and Trust Company (Limited)...</i>	261
Conditions of sale—Water-rate—Liability.	
<i>G., in anticipation of the discovery of gold in the Prince Albert district, laid out a township on his farm and advertised and offered erven for sale. The erven were sold subject to conditions of sale, the 12th condition being in the following terms. . . .</i>	
<i>Water will be laid on to the Market-square for the domestic use of erf-holders on condition of a payment of 5s. per month to the seller, his order, or representative by the owner or occupier of each erf.</i>	
<i>S. bought three erven and signed the conditions of sale.</i>	
<i>G. laid on water to the intended site of the Markets-square, but it was not used, as the expectations with regard to the discovery of gold were not realised, and in consequence no buildings were erected on the erven.</i>	
<i>Held, on appeal, that S. was liable under the 12th condition of sale to pay the water rate.</i>	
<i>Scott v. Gillet</i> ...	296
Curator bonis—Release from office.	
<i>Curator bonis of a lunatic relieved from his curatorship on the grounds of his advanced years, bodily ailments, and consequent inability to attend to the affairs of the estate.</i>	
<i>Ex parte Bertram</i> ...	368
Deaf mute—Curator bonis—Rule nisi.	
<i>Where there was prima facie evidence that a deaf mute was incapable of managing her affairs, the Court appointed a curator ad litem to assist her, and granted a rule nisi calling upon her to show cause why a curator bonis should not be appointed to manage her property.</i>	
<i>Re Spolander</i> ...	254

	PAGE
Divorce—Pauper suit.	
<i>The Court refused to allow a petitioner to sue his wife in forma pauperis in an action for divorce, where the respondent was alleged to have deserted the petitioner forty-five years previous to the date of the application.</i>	
<i>Scheepers v. Scheepers</i> ...	259
Divorce—Pauper suit.	
<i>Unless there are some very special circumstances the Court will not in future refer petitions for leave to sue in forma pauperis in actions for divorce to counsel.</i>	
<i>Murphy v. Murphy</i> ...	260
Executor Testamentary—Error in name.	
<i>Where a testator had, by his last will, appointed John Mason Edmeades of Oudtshoorn his executor, and there was no person of that name in the district, but there was evidence to show that the testator intended to appoint his friend, John Robert Bazett Edmeades, his executor, the Court granted a rule calling upon all persons concerned to show cause why letters of administration should not be granted to J. R. B. Edmeades.</i>	
<i>Ex parte Edmeades. Re Jeffrey's Will</i>	353
Executors Testamentary—Release from office.	
<i>Where the petitioners had been appointed executors testamentary, but not administrators, and had no power of assumption under the will, and the administration of the estate was likely to extend over a considerable period, the Court at their request accepted their resignation and appointed a Trust Company in their place.</i>	
<i>Ex parte Schreiner and Silke Re Reitz's Will</i> ...	367
2.—Application for removal.	
<i>Where sufficient cause had not been shown for removing executors testamentary from their trust the Court</i>	

	PAGE
<i>granted a rule nisi calling upon them to show cause why the estate should not be realised and accounts filed within three months from the date of the order.</i>	
Birt and Close v. Jones's Executors ...	253
Farm — Action to compel transfer— Costs—Myburgh v. Green ...	277
Husband and wife—Interdict. <i>A wife, married out of community of property, advanced her money to her husband to enable him to purchase certain land but obtained no security for the loan.</i> <i>Thereafter she instituted an action against him for divorce on the ground of incest and for a refund of the money, and, having ascertained that he was about to alienate the property, she applied for an interdict to restrain him from alienating or mortgaging the land pending such action.</i> <i>Held, that the husband's marital power did not debar the wife from the relief sought, and that, as no creditors would be injured thereby, she was entitled to a temporary interdict.</i>	
Liebetrau v. Liebetrau ...	284
Insolvency—Release—Notice—Practice. <i>At the first and second meetings in an insolvent estate no creditors appeared and no trustee was elected.</i> <i>Thereafter the insolvent applied for the release of his estate from sequestration.</i> <i>The Court refused the application on the grounds that notice had not been published in the "Gazette" nor had an affidavit of full and fair surrender been filed.</i>	
Ex parte Van Broembeen ...	257
2.—Liquidation—Liabilities. <i>Where the liabilities of a partnership were not in respect of the general body of creditors but were represented by losses on the partners' capital and</i>	

	PAGE
<i>an agreement had been come to amongst the members of the partnership to liquidate their business, and it was anticipated that there would be a substantial balance after all creditors had been paid in full,</i> <i>The Court discharged a provisional order of sequestration obtained on the petition of a creditor, the wife of one of the partners.</i>	
Van der Walt v. Kruger, Pelsner & Co.	263
Interdict—Trespass. <i>Interdict granted, pending the institution of an action, restraining the making of bricks and other similar acts of trespass on the remaining extent of the farms "Hartbeest River" and "Grobelaar's River," commonly called the Commonage of Oudtshoorn.</i>	
Lind v. Gibbs & Cooper ...	292
2.—Trespass — Agent verbally appointed. <i>The Court, on the application of an agent verbally appointed by his principal, who was in England at the date of the application, granted an interdict restraining trespass and other injuries to land.</i>	
Brewis v. Scott ...	360
Lessor and lessee—Tacit hypothecation—Movables of a third person <i>The owner of furniture let it to the lessee of certain premises, who afterwards removed it to other premises without the knowledge or consent of such owner.</i> <i>Held that, although the lessor of the new premises had no notice that the furniture did not belong to the lessee, he had no tacit hypothecation over the furniture.</i>	
Heugh's Trustee v. Heydendrych ...	327
Liberty of the subject—Habeas Corpus —Trial and sentence by Proclamation—Pondoland Annexation Act, 1894,	

	PAGE		PAGE
<i>The Act for the annexation of Pondoland enacts that the said Territory shall be subject to such laws as have already been proclaimed, and such as, after annexation, the Governor shall from time to time by Proclamation declare to be in force in such Territory.</i>		<i>B, Rule 34, and the appeal is not prosecuted, notice of withdrawal should be given to the Magistrate.</i>	
<i>Among the laws so introduced was the Native Territories Penal Code. Thereafter the Governor issued a Proclamation declaring that the Chief Sigcau "had by his acts, in disregard and defiance of the law, rendered himself liable to arrest," and authorising the Chief Magistrate to arrest and detain him in such safe place as may be by the Governor from time to time determined.</i>		<i>Cloete's Trustee v. Green</i>	264
<i>Held, on an application by Sigcau for his release from imprisonment, that the Act did not authorise the issue of a Proclamation for the arrest, condemnation and imprisonment of any individual, without the intervention of any judicial tribunal, and that the applicant was entitled to be released.</i>		<i>Principal and agent—Donation exceeding £500—Non-registration.</i>	
<i>Sigcau v. The Queen</i>	268	<i>Where an agent had been employed by his principal to realise an estate, and had deducted from moneys received by him on account of his principal the sum of £600, alleged to have been given by the principal as a donation to the agent's wife, the Court set aside the transaction on the grounds inter alia of non-registration, and that in the absence of a deed of donation, there was no clear indication of the donor's intention.</i>	
<i>Minor's property—Mortgage.</i>		<i>Laukester v. Morris</i>	333
<i>Under special circumstances, and where it was clearly for the benefit of minors, the Court authorised their father, who had bought landed property and had it transferred to himself in trust for his minor children, to mortgage the property for the purpose of raising money to build a cottage to be occupied by himself and his children.</i>		<i>2.—Overcharges—Vouchers.</i>	
<i>Ex parte Vallance</i>	285	<i>Where an agent had undertaken to import merchandise for his principal and had overcharged him considerable sums, and had failed to render vouchers for certain alleged disbursements in respect of freight, insurance, and dock dues, the Court ordered the agent to supply the vouchers within three months, although there was some evidence to show that it was not customary to render vouchers for such items.</i>	
<i>Notice of appeal—Resident Magistrate—Withdrawal.</i>		<i>Lazarus v. Levin</i>	344
<i>When an appeal has been noted from a Magistrate's judgment, which has been carried into execution, and security found by the successful suitor under Act 20 of 1856, Schedule</i>		<i>Provisional sentence—Promissory note—Negotiable instrument—Indorsement—Cession.</i>	
		<i>The defendant, being the maker of a note, whereby he promised to pay to B. or order the sum of £55, the amount to be deducted from another note made by B in his favour and payable at the same date, was sued on the note for provisional sentence by the Standard Bank, which claimed to be the legal holder by virtue of B.'s blank endorsement</i>	
		<i>Held (1) that the note, not being an unconditional promise to pay, was not a promissory note and (2) that</i>	

PAGE

the note, not being a negotiable instrument, could not be ceded merely by the payee's indorsement in blank so as to found a provisional claim in favour of the bank as holder.

Standard Bank v. Marais ... 364

Public road — Natural obstruction — Interdict.

A road which had been used by the public for upwards of thirty years was obstructed at one part by a sand hill blown across it.

Held, that those entitled to the use of the road had no right, without the permission of the owner of the land, to make a new track in a different direction and that, if owing to the impossibility of crossing the natural obstruction, they went round the sand hill, they should do so by the least circuitous route coming back to the existing road.

The fact that the owner did not for a number of years object to the new track—which was made without any expense—being used does not debar him from his right to an interdict against its further use.

Assman v. Rautman ... 286

Rent—Evidence—Question of fact.

Magistrate's judgment reversed on a question of fact where the weight of evidence was against the Magistrate's finding.

Erentzen v. Devlin ... 329

Restraint on alienation—Consideration — Pre-emption — Co-owners — Renunciation.

The co-owners in undivided shares of a farm entered into a contract among themselves that should any of them wish to alienate his share he shall be bound first to offer it to all his co-owners for a certain price.

Held, that the contract was valid and could be enforced.

The fact that the farm was subsequently subdivided or that some of

PAGE

the co-owners did isolated acts inconsistent with the terms of the original contract held to be insufficient to prove a renunciation of their rights of pre-emption by all the co-owners.

Smith v. Momberg and Others ... 300

Rule 36—Notice.

Where it is intended to apply to have property declared executable under Rule 36, notice of the application should be given to the defendant.

Engelbrecht v. Botha ... 366

Rule 319—Account.

Judgment given under Rule 319 for an account, which was ordered to be rendered within fourteen days, failing which, judgment was granted for a definite amount.

Scott v. McColla ... 352

Sale of land — Purchaser's mistake — Interdict—Reasonable tender.

Where a purchaser bought one lot of ground, No. 77, and shortly afterwards proceeded to build a house on the adjoining lot, No. 76, under the erroneous impression that lot 76 was the one which he had purchased, and on discovering the mistake applied to the Court for an interdict restraining the seller from disposing of lot 76, the Court refused the application on the grounds inter alia that it was unnecessary, as the seller had made a reasonable offer to transfer lot 76 to the purchaser, against transfer of lot 77, on the latter's paying all expenses.

Priem v. Winter ... 331

Salvage—Derelict.

A ship, having been abandoned by the master and crew owing to her rudder being disabled, was rescued as she was nearing a rocky coast, whither she had drifted at the rate of about a mile an hour.

The rescuers having done the work at some risk and with considerable skill,

	PAGE		PAGE
Held, that they were entitled to salvage remuneration.		had been deceived, and (3) that the applicant himself, when first informed of the mark being used by the respondent in the Transvaal, found no fault with it.	
Held further, that, although it may not have been absolutely necessary for the muster and crew to abandon the ship, yet as they had in fact abandoned her under circumstances of some danger, she must be deemed to have been a derelict, that although the risk to the salvors was not great, they were entitled to be remunerated on a liberal scale, and that under the circumstances one-sixth of the value of the property saved was a fair amount.		Leave given to applicant to institute action for infringement of his trade mark.	
Associated Boating Companies v. Baarsden. Re "The Lief" ...	338	Somervell Bros v. Cuthbert & Co. ...	266
Servitude against obstruction of light—Construction—Servient and dominant tenement.		2.—Infringement of—Fancy design—Label.	
A servitude against the obstruction of light by the owner of land was constituted in the following terms: "The proprietors of this lot shall by no means whatever obstruct the windows of the store of lot No. 8 looking into the passage belonging to lot No. 1 nor prevent free access of light into the same."		A label with a fancy design in blue and silver having been registered as the trade mark of the manufacturers of brandy, the respondents used upon their bottles of brandy a label with exactly the same design and with the words "Cognac" and "Old Brandy" in exactly the same places as on the registered label, so that at a distance of four or five yards no difference was discernible	
Held, that the servitude applied to windows of the store in existence at the time when the agreement for a servitude was made and that the owner of the servient tenement should not be interdicted from obstructing the light entering the store by means of additional window space constructed by the owner of the dominant tenement.		Held that, although neither the applicants' name nor the sign of a bird on a shield was appropriated, the close similarity was calculated to deceive the ultimate consumers, and that the imitation constituted an infringement of the trade mark.	
St. Leger v. Town Council of Cape Town	264	Interdict granted, but its operation suspended for three months.	
Trade mark.		Martell & Co. v. Paarl Berg Wine Co....	330
Application on motion for the removal from the register of the trade mark CKing, alleged to be an infringement of the trade mark "K" in a diamond, refused, on the ground (1) that the application was made twelve months after registration, (2) that there was no proof that anyone		Transfer deeds—Registration—Error.	
		Where transfer deeds had been erroneously registered in the Deeds Office, Cape Town, instead of in the Deeds Office, King William's Town, the Court authorised the cancellation of the originals and the issue of certified copies to be registered in the King William's Town Office as having been passed on the dates mentioned in the deeds.	
		Ex parte Oosthuizen ...	260
		Trustee—Misconduct—Insolvent estate.	
		The first duty of a trustee of an insolvent estate is to advance the interests of the estate which he ad-	

PAGE

ministers, and if he wilfully damages such interest, in order to advance his own, he is guilty of misconduct.

At the third meeting of creditors of an insolvent estate a resolution was proposed that a certain auctioneer should conduct the sale of the assets, to which the respondent, one of the trustees, acting under powers of attorney, proposed and seconded an amendment that he should himself be the auctioneer.

The original resolution having been carried, his co-trustee advertised the sale, but on the day advertised the respondent appeared and did everything in his power to obstruct the sale and prevent its being a success.

He also proceeded with litigation against the wishes of his co-trustee.

On the application of certain creditors the respondent was removed from his trust.

Hall & Orsmond v. Fitzgerald ... 282

2.—Consent to transfer of land—
Right of pre-emption.

Certain land was transferred to four purchasers and a deed of sale was executed and registered with the transfers giving the purchasers interest in certain rights of pre-emption.

Thereafter one of the purchasers became insolvent and his interests in the land were sold for the benefit of his creditors to his trustee, the bondholder.

Subsequently one of the purchasers with the consent of his co-purchasers, including the insolvent, sold his land to a stranger.

The trustee declined to sign a document consenting to the sale and in consequence the Registrar of Deeds refused to pass transfer.

On application being made to the Court for an order compelling the trustee to consent, a rule nisi was granted calling upon him to show cause why the Registrar of Deeds

PAGE

should not be authorised to allow transfer, without his consent, either individually or in his capacity, and on the return day the rule was made absolute with costs de bonis propriis against the trustee.

Lamprecht v. Lamprecht's Trustees ... 361

Undue preference—Insolvent Ordinance, section 84—Act 38 of 1884, section 8.

Pledge of cattle declared an undue preference where the transaction took place three months before sequestration, the pledgor being at the time hopelessly insolvent.

Botha's Trustee v. Gray... 298

2.—Insolvent Ordinance, sections 84 and 90—Pleadings—Tender.

In August, 1894, S. advanced to W. £62, as security for which W. pledged to S. certain live-stock.

In the following October W. having bought certain carts on credit allowed S. to sell two, of the carts and out of the proceeds to pay himself the £62, whereupon S. redelivered to W. the pledged stock, the value of which was found by the Court to be about £40. W. surrendered his estate in January, 1895.

Held, in an action by the trustee of W.'s estate against S. that the payment by the insolvent to S. in October, 1894, was an undue preference to the extent of £20, the difference between the amount of the payment and the value of the pledge.

Where it is intended to rely on the 90th section of the Ordinance that section should be pleaded.

Van der Westhuizen's Trustee v. Steyn 313

3.—Insolvent Ordinance sections 84 and 86—Transaction in the ordinary course of business.

T. & Co., the holders of an overdue promissory note, having received information that H., the maker of the note, of whose financial position they were ignorant, was about to

	PAGE
<i>hold a sale of cattle, sent the note to the auctioneer for collection, there being no bank in the village.</i>	
<i>The auctioneer, with the consent of H., deducted the amount of the promissory note from the proceeds realised by the sale of the cattle and remitted it to T. & Co.</i>	
<i>This transaction took place in April, 1895, and in the following month H. surrendered.</i>	
<i>Held, in an action by H.'s trustee against T. & Co. to have the payment of the note declared an undue preference, that the transaction was in the ordinary course of business and was protected by the 86th section.</i>	
Horwitch's Trustee v. Twentymau & Co.	323
Warrant of apprehension — Criminal offence — Summary jurisdiction — Divisional Councils Act, 1889, sections 153 and 154—Swing gate.	
<i>Except where otherwise specially provided by law, warrants for the apprehension of persons charged with offences, which plainly appear to be proper for a Court of summary jurisdiction, should not be granted unless the person charged shall first have been summoned and shall have neglected, on the day appointed by the summons, to appear to answer the charge.</i>	
<i>To support a prosecution for a contravention of the 154th section of the Divisional Councils Act, 1889, it is not necessary to prove that the Divisional Council has approved of the swing gate, which the defendant is charged with having left open.</i>	
<i>A person so charged should not be arrested until he has neglected to appear to a proper summons.</i>	
Willemse and Others v. Lategan ...	350
Watermill — Servitude—Grant—Diversions of water — Interdict — Forfeiture.	

	PAGE
<i>In 1831 the Governor sold and granted to the plaintiff's predecessor in title a plot of ground on condition that "the proprietor shall have no right or privilege whatever with regard to the main stream to supply the town of Worcester, save and except of using it for the special purpose of keeping the watermill at work" and that if the proprietor shall make any "deviation of the water he shall forfeit for ever the right or privilege of water hereby granted."</i>	
<i>Before the grant no water was taken out of the stream above the mill for the supply of the town, but in 1874 the Municipality constructed water-works diverting a portion of the stream above the mill and the Government, with the consent of the Municipality, also diverted a portion for railway purposes, but no objection was raised by the owner of the mill until 1892, when the capacity of the pipes for diverting the water was increased.</i>	
<i>Held, that the grant constituted a servitude to lead the main stream over the mill for the purpose of having the full use of its water power, and that the plaintiff, as the present owner of the mill, was entitled to an interdict restraining the increased diversion.</i>	
<i>The owners of the mill had for many years been in the habit of using some of the water for domestic purposes and for irrigating a small garden without any objection on the part of the Government or of the inhabitants of the town and without any perceptible diminution of the stream.</i>	
<i>Held, that such user could not now be relied upon as a ground for forfeiting the plaintiff's servitude under the grant.</i>	
Joubert v. Worcester Municipality and Colonial Government	303

	PAGE		PAGE
Wills Ordinance — Signature — Initials — Testator.		Held, that when once the genuineness of the initials was established there was a sufficient compliance with the requirement of the Ordinance that the testator and witnesses shall sign their names upon at least one side of every leaf.	
<i>A signature by means of the testator's initials is a sufficient compliance with the requirement of the Wills Ordinance that he shall sign his name.</i>		<i>In re Ebdon's Will (4 Juta, 495) approved.</i>	
<i>The testatrix and witnesses duly signed at the foot of a will written upon more pages than one, but the only signature of the testatrix to the first leaf was made by means of her initials just above the initials of the witnesses, apparently made with the view of authenticating an erasure on the second page.</i>		<i>Van Vuuren's Case (2 Searle, 116) overruled.</i>	
		<i>In re Trollip</i> 258	



REPORTS OF ALL CASES
DECIDED
IN THE SUPREME COURT

OF THE
CAPE OF GOOD HOPE,

DURING THE YEAR 1895
(WITH TABLE OF CASES AND DIGEST.)

REPORTED BY

J. D. SHEIL,

OF THE INNER TEMPLE, BARRISTER-AT-LAW, AND ADVOCATE OF THE
SUPREME COURT.

VOL. V.
(1895.)

CAPE TOWN:
PRINTED AND PUBLISHED AT THE "CAPE TIMES" OFFICE, ST. GEORGE'S ST
1896.

JUDGES OF THE SUPREME COURT DURING THE YEAR 1895.

Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice.)

Hon. Mr. Justice BUCHANAN.

Hon Mr. Justice UPINGTON, K.C.M.G.

Attorney-General.

Hon. W. P. SCHREINER, Q.C., C.M.G.

TABLE OF CASES.

VOL. V.

	PAGE
Abelsohn's Trustee v. Van der West- huizen	57
Abrahams v. Abrahams	354
Abrahamse v. Immelman	323
African Banking Corporation v. Bond...	209
" " " v. Van Broembsen	149
Albert District Gold Mining Co., re, 262,	296
Alford, Wills & Co. v. Brink	128
Aling, <i>ex parte</i>	7
Aliwal North Board of Executors (in liquidation), re	141, 169, 331, 484
Aliwal North Board of Executors (in liquidation) v. Greathead	451
Anderson v. Anderson	22
Anderson's Executors v. Welgemoed ...	57
Ashburner v. Ashburner	276
Assman v. Rautman	286
Associated Boating Companies v. Baard- sen. Re "The Leif"	338
Atkinson's Executors v. Jellicorse ...	458
Atmore v. Shaddock	59, 466
Baart v. Baart	266, 381
Badenhorst v. Bloem and Another ...	149
Bader, <i>ex parte</i>	253
Bailay v. Vivier	149
Bam's Executors v. Tout	427
Barrington v. Colonial Government ...	313
Barry's Executors v. Bosman	366
Bartrum, Harvey & Co. v. Murch ...	256
Basson, <i>ex parte</i>	417
Beedle & Co. (Limited) re	68, 76
" " " v. Bowley	412
" " " v. McLeod	223
Beetham v. Slamie	100
Bell v. Bell	477
Benjamin v. Benjamin	22
Bennett v. Hall	426
Berghuis, <i>ex parte</i>	14

	PAGE
Berning, <i>ex parte</i>	312
Bertram, <i>ex parte</i>	368
Bibbey, <i>ex parte</i>	352
Biccard's Trustees v. Visagie	323, 416
Birt and Close v. Jones's Executors ...	253
Black v. La Grange and Another	2
Bloach v. Schiemann	98
Board of Executors v. Dean	147
Boll's Estate, re	477
Bolus, <i>ex parte</i>	445
Bond's Insolvent Estate, re	221
Borcherds, <i>ex parte</i>	58
Borcherds, <i>ex parte</i>	147
Borman (Minor), re	157
Bosman, <i>ex parte</i>	2
" & Co. v. Haupt... ..	241
" " v. Pease	366
Botha, <i>ex parte</i>	14
" "	380
" "	464
" re	485
Botha's Trustee v. Benzien	256
" " v. Gray	298
Bould and Barter v. Abas	402
Bourhill's Estate v. Ark of Safety Lodge, Caledon	381, 439
Bowern's Estate. re	465
Bradford v. Green and Another	129
Braude v. Verdoes	104, 184
Bredenkamp v. De Villiers	350
Brewis, re	387
" v. Scott	360
Breytenbach v. Smuts' Executors and Others	59
Brink, N.O. v. The High Sheriff and Fletcher's Executors	420
Britstown D.R. Church, re	286
Broad v. Schultze & Smith	183
Brookfield v. Brookfield	171, 211, 282
Brown (Minor), re	228

	PAGE
Brunette's Estate, <i>re</i>	371
Burdett's Estate, <i>re</i>	19
Burmeister and Others, <i>ex parte</i> .— <i>Re</i> "Ernestine"	68
Burmeister v. Schiemann	98
Burns v. Town Council of Cape Town...	82
Cape of Good Hope Bank (in liquida- tion), <i>re</i> , 71, 98, 129, 143, 172, 313,	357
Cavanagh v. Cavanagh	182
Champion, <i>ex parte</i>	369
Christie's Trustee v. Van der Spuy ...	366
Claassen v. Claassen	225
Claremont Municipality v. Cape Town Districts Waterworks Co.	478
Clark, <i>ex parte</i> .— <i>Re</i> Clark's Estate ...	59
Cleghorn, <i>ex parte</i>	290
Clements & Co. v. Van Rhyu	38
Clements & Co. v. Vos	38
Cloete, <i>ex parte</i>	241
Cloete's Trustee v. Green	264
Coetzee v. Erlank... ..	57
Coetzee's Insolvent Estate, <i>re</i>	428
Coetzer, <i>ex parte</i>	489
Coleman v. Gerds' Tutors	167
Colonial Government v. Andries	146
" " v. Botha	489
" " v. L. and S. A. Exploration Co.	194
Colonial Government v. McCay... ..	427, 488
" " v. Silo	209
" " v. Wehr	416
" " v. Wright	482
Colonial Marine Assurance and Trust Co., <i>re</i>	261
Colonial Orphan Chamber v. Bester	149, 323
" " " v. Botha	370
" " " v. Loubser	146
" " " v. Stewart	128
Combrinck & Co. v. Colonial Govern- ment	105, 130
Combrinck's Estate, <i>re</i>	419
Commissioners Sea Point and Green Point Municipality v. Colonial Secre- tary and Resident Magistrate, Cape Town	445
Cook Bros. v. Colonial Government, 58, 72, 107, 140	
Cormack, <i>ex parte</i>	445
Cressey and Others v. Haarhoff's Trustee	157

	PAGE
Cross v. Cross's Executors	459
Curtis, <i>ex parte</i>	290
Da Silva v. Da Silva	19
Davis, <i>ex parte</i>	228
Davison v. Vaughan	483
Day v. Day	20, 37, 156, 467
Dearham v. Dearham	312, 370, 478
De Beers Consolidated Mines v. Kim- berley Waterworks Co.	101, 129
De Klerk v. Le Roux and Samaai	439
De Kock, <i>ex parte</i>	171
Demas v. Demas	333
Dembitzer v. Jacobson	172
De Meillon, <i>re</i>	169
Derksen, <i>ex parte</i>	417
Deschamps, Horsley & Co. v. Kretzinger	146
De Villiers, <i>ex parte</i>	14
De Villiers, <i>ex parte</i>	147
De Villiers, <i>ex parte</i>	224
De Villiers, <i>ex parte</i>	323
" v. Deyzel	413
" v. Van Dyk... ..	129
" v. Van Niekerk	482
" v. Wolhuter	165
Diaz v. Laurence... ..	409
Dickson v. Dickson	20, 71, 90, 159
Dickson & Co. (Limited), <i>re</i>	12
" Bayly & Co. v. Saniford	146
Dodd, <i>ex parte</i>	464
Doe v. Brown	79
Dreyer, <i>ex parte</i>	483
Drew (Minors), <i>re</i>	224
Du Plessis, <i>ex parte</i>	367
Du Plessis v. Ferreira	99
Du Plessis v. Roux	146
Du Preez v. Neethling	461
Duraan v. Gresse... ..	147
D.R. Church v. Snyman	147
Du Toit, <i>ex parte</i>	257
Du Toit's and Bloxam's Ante-nuptial Contract, <i>re</i>	211
Du Toit's Estate, <i>re</i>	188
" " " 	363
Eagle, <i>ex parte</i>	11
Eaton, Robins & Co. v. Olliers	149
" " v. Fouchee	224
" " v. Moller	266
" " v. Redelinghuys	147

TABLE OF CASES.

iii

	PAGE
Eaton, Robins & Co. v. Uys	147
Ebden v. Botha	128
Edmeades, <i>ex parte</i> .— <i>Re</i> Jeffrey's Will	353
Edmeades' Insolvent Estate, <i>re</i> ...	363
Eilenberg v. Jacobson & Co.	1
Elliott, <i>ex parte</i>	148
Engelbrecht v. Botha	366
Engel's Estate, <i>re</i>	19
Erasmus v. Moolman	98
"Ernestine," <i>re</i>	53
Erentzen v. Devlin	329
Evans, <i>ex parte</i>	167
Fairbridge, Arderne & Lawton v. Van der Spuy	459
Faure, Neethling & Co. v. Beyers ...	434
Ferreira v. Du Plessis	225
Ferreira's Estate, <i>re</i>	19
" " "	387
Field v. Udwin	380
Field & Co. v. Wernikoff	26
Findlay & Co. v. Klaas and Another ...	129
Fittig v. Pederseu	256, 459
Fletcher & Co. v. James... ..	147, 276
Fletcher's Executors v. Keytel	147
Ford's Estate, <i>re</i>	428, 484
Forrester, <i>ex parte</i> .— <i>Re</i> Minors Starck	11
Fossati v. Kleynhans	140
Fourie, <i>ex parte</i>	369
" "	161
" <i>re</i>	86
Fraser v. Cunningham	68
Fredericks v. Jaffar	394
Freemantle v. Henning	6
Frere Hospital, East London, <i>ex parte</i> Managers	10
Friberg v. De Jager	161
Fryer v. Louw's Executrix	313
Furnivall v. Cornwell's Executors ...	14
Garlick v. Mommen	290
Gasson v. Blacking and Izdebski ...	437
General Estate and Orphan Chamber v. Niewoudt	482
Gibbs, <i>ex parte</i>	380
Gie's Bond, <i>re</i>	260
Glacier's Executors v. Quin's Executors	366
" Estate, <i>re</i>	380, 381
Goedhals's Executors v. Goedhals's Exe- cutor	377

	PAGE
Goldschmidt v. Botha	256, 257
Gordon & Gotch v. Knight	366
Gottlieb v. Grimbeck	455
Goulding, <i>ex parte</i>	431
Gourlay & Co. v. Simons	187, 224
Grace, <i>ex parte</i>	366
Grand Parade Building Co. v. Nannucci	167
„ Hotel Co., <i>re</i>	387, 464
Greeff v. Pretorius	132
Green v. Bradford	268
Green and Another v. Mandy's Trustee	432
„ „ v. Orsmond and	
Another	367
Grundling's Executor v. Lategaan and	
Others	140, 143, 419
Guest, <i>ex parte</i> .— <i>Re</i> Pawle's Will ...	464
Guites, <i>ex parte</i>	401
Gush, <i>ex parte</i>	323
Haarhoff's Insolvent Estate, <i>re</i> ...	140
Haase, Vaughan & Co. v. Malcolm's	
Trustee	23
Hall, <i>ex parte</i>	224
Hall & Orsmond v. Fitzgerald ..	282
Hall's Estate, <i>re</i>	230
Hand & Co. v. Droomer and Another...	338
„ v. Lotze	366
„ v. Millen	256
„ and Others v. Simonhoff ...	149
„ v. Thompson	256
Harris v. De Waal	414
Hart, <i>re</i>	431
Hartmann v. Hartmann... ..	484
Hartford v. Walker	70
Hartog, <i>ex parte</i>	483
Hauman v. McFarlane and Another ...	467
Hauptfleisch, <i>ex parte</i>	445
Hauptfleisch v. Hauptfleisch ...	38, 80, 153
Hawkins v. Hawkins	187
Hayward v. Gerd's Tutors	207
„ v. Hayward	153, 276
Hearns v. Jackson	187, 275
Helfrich's Executors v. Steyn ...	366
Hepworth & Co. v. Colonial Govern-	
ment	251
Herman's Estate, <i>re</i>	225
Hertog, <i>ex parte</i>	489
Hengh's Trustee v. Heydenrych ...	327
„ Trustees v. Fry's Executrix, 338,	458
Heydenrych v. Hubbard	147

	PAGE		PAGE
Heyneman's Trustee v. Loubser ...	185	Kerdel v. Bam ...	25
Hibernian Distilleries v. Crowder ...	275, 380	Kilian's Estate, <i>re</i> ...	225
Hiddingh v. Uys ...	98	King v. Voigt ...	209
High Sheriff v. Klyuhaus ...	147	Klaiba v. Klaiba ...	157
Hill Bros. v. Reich ...	68, 130	Koch v. R.M., Van Rhyn's Dorp, and Zackon ...	155
Hodgson, <i>ex parte</i> ...	366	Koch v. Zackon ...	223, 299
Hofmeyr v. Du Toit ...	370	Kohler and Others v. Baartman ...	104, 241
Hofmeyr & Regter v. Du Toit ...	146	Krause, <i>ex parte</i> ...	148
" " v. Page ...	209	Kruger, <i>re</i> ...	2
Hollinghurst v. Frame & Co. ...	167, 224	Kruger (Minors), <i>re</i> ...	71
Hooper's Estate, <i>re</i> ...	157	Kyd, <i>ex parte</i> ...	143
Hope v. Illario ...	136		
Hopley, <i>ex parte</i> ...	228	Lamprecht v. Lamprecht's Trustee ...	361
Horwitsche's Trustee v. Twentymau & Co. ...	323	Landsberg v. Dancer ...	256
Hough's and Du Plessis' Ante-nuptial Contract, <i>re</i> ...	12	" v. Van Wyk ...	482
Hudson, Vreede & Co. v. Cooper ...	129, 171	Lane, <i>ex parte</i> ...	366
Hughes v. Stent ...	380	Lankesier v. Morris ...	333
Hugo, <i>re</i> ...	59	Lotriet's Executrix v. Snyman ...	224
Human, <i>re</i>	371, 419	Lawrence v. Lawrence ...	105, 133
Humphries, <i>ex parte</i> ...	19, 148	Laws, <i>ex parte</i> ...	7
Hunter, <i>re</i>	484	Lazarus v. Levin ...	344
Hyland v. Schiemann ...	98	Leaf & Co. v. Vallentine ...	401
		Leibbrandt, <i>re</i> ...	489
Incorporated Law Society v. Biccard ...	372	Leonard v. Van Niekerk ...	350
" " " v. McColla ...	488	Le Roes v. Goldie ...	392, 485
Ireland, Fraser & Co. v. Bonamici ...	147	Le Roux's Estate, <i>re</i> ...	72, 276
Irvine, <i>in re</i> ...	485	Levenson, <i>ex parte</i> ...	2
		Levin v. Wassermann ...	1
Jacobsohn, <i>ex parte</i> ...	70	Lewis v. Du Toit... ...	147
Jacobus' Estate, <i>re</i> ...	327	Liebetrau v. Liebetrau ...	284, 408
Jagger & Co. v. Levi ...	364	Lind v. Gibbs & Cooper ...	292
Janseuville Municipality, <i>re</i> ...	8	Lindenberg v. Naudé ...	3
Jenner, <i>re</i>	59	Lithman v. Horn ...	171
Jones v. Town Council of Cape Town 27, 172, 183		Lithman's Trustee v. Gilderblom ...	426
Jones v. Vickers's Trustee ...	34	Lloyd, <i>ex parte</i> .— <i>Re</i> Lloyd's Will ...	150
Joubert, <i>re</i> ...	401	London and S.A. Exploration Co. v. G.W. Diamond Mining Co....	4, 148
" v. Germishuys ...	445	London and S.A. Exploration Co. v. Official Liquidator, N.E.B., and Registrar of Deeds, G.W. ...	235
Joubert v. The Worcester Municipality and Colonial Government ...	303	Loock v Kluyts ...	171
Judd (Minor), <i>re</i>	367	Lotriet v. Lotriet... ...	482
Juli's Estate, <i>re</i> ...	144	Lourentz's Estate, <i>re</i> ...	381
		Louw v. Kupke ...	14
Kafrarian Colonial Bank, <i>re</i> ...	371	Lynch v. Colonial Government, 286, 327, 350	
Kaulela's Estate, <i>re</i> ...	489		
Kay, <i>ex parte</i> ...	210	Maddison v. Bosman ...	485
Keese v. Simes ...	380, 399	Maguire v. Crofton ...	367
Kennedy v. Mare... ...	419, 427	Malan, <i>ex parte</i> ...	275
Kent, <i>re</i> ...	363		

TABLE OF CASES.

V

	PAGE
Malcolm's Trustee v. Haase, Vaughan & Co. ...	19
Malmesbury Board of Executors v. Bassou ...	128
Mandy's Insolvent Estate, <i>re</i> 35, 105,	129
Marais, <i>ex parte</i> ...	366
Marais v. Binder ...	58
Marais & Co. v. Beyers ...	319
Mardt v. Hickson, Son & Co. ...	474
Marincowitz v. Matthys... ..	229
Markham v. Frame ...	76
Marsh v. Manuix ...	1
Martell & Co v. Freimond ...	485
" " v. Paarl Berg B.W. & S. Co. ...	330
Maskew's Executors v. Truter ...	419
" " v. Van der Walt... ..	146
" " v. Van der Walt (J.D.'s son) ...	146
Mason v. Mason ...	18, 148
Master v. Brink's Executrix ...	2
" v. Dismore's Executrix ...	128
" v. Gerd's Tutors... ..	147
" v. Groenewald's Executors ...	149
" v. Hough's Executor ...	256
" v. Louw's Executrix ...	149
" v. McDonald's Executors ...	58
" v. Nicholson's Trustee ...	3
" v. Pringle's Trustee ...	260
" v. Prins' Executors ...	3, 19
" v. Turton & Nicholson's Trustee	260
" v. Van Vuurens' Trustees ...	260
Masterson, <i>ex parte</i> ...	464
Matthys v. Henning ...	163
Maxwell, Earp & Co. v. Brink... ..	256
" " v. Nefdt... ..	149
" " <i>ex parte</i> . — <i>Re</i> Nefdt's Estate ...	167
McCahy v. Williams ...	136
McColla v. Taylor ...	207
McGibbon, <i>ex parte</i> ...	35
McGrath v. McGrath ...	20
McIntyre, <i>ex parte</i> ...	146
McKenzie & Co. v. Schiemann ...	98
McLaren v. Smidt ...	98
McLeod v. Beedle & Co. (in liquidation)	183
" v. Gedye ...	366
" v. Meyers ...	167
Megone, <i>ex parte</i> ...	143
Meiring's Estate, <i>re</i> ...	57

	PAGE
Mendelsohn v. Judelsohn ...	256
Meyer and Others v. Meyer's Executors	248
Michiel v. Michiel ...	427
Michell, <i>ex parte</i> . — <i>Re</i> Bltyh's Will ...	157
Midland Agency v. Burger ...	261
Miller v. Van Aarde ...	369
Mills's Executors v. Stellys and Others	188
Minto, <i>ex parte</i> ...	99, 417
Mitchell & Co. v. Mocke... ..	366
Moore v. Spangenberg ...	459
Morgenrood v. Morgenrood 147, 149,	169
Morris, <i>re</i> ...	431
Morris v. Morris and Page ...	433
Mostert v. Le Roex ...	323
Mostert's Estate, <i>re</i> ...	464
Murphy v. Murphy ...	260
Myburgh, <i>ex parte</i> ...	2
Myburgh v. Green ...	277
Myburgh's Assignees v. Taylor ...	2
Myburgh's Estate, <i>re</i> ...	367
Naude v. Fry's Executrix ...	171
Neezer v. Neezer's Executors ...	350
" v. Pentecost ...	459
Nel, <i>re</i> ...	371
Nel v. Nel's Executrix ...	472
Nel v. R.M. of Worcester ...	153
Nel's Insolvent Estate, <i>re</i> ...	156
Newman v. Mayor of East London ...	41
Nightingale v. White, Muller & Co. ...	367
Nolte and Another v. Registrar of Deeds	105
North Eastern Bultfontein Co., <i>re</i> ...	9
Oakeshott's Trustee v. Bank of Africa... ..	68
Olivier, <i>ex parte</i> ...	370
Olivier v. Strydom ...	313
Oosthuizen, <i>ex parte</i> ...	260
Oppel and Others v. Le Roux and Others ...	151
Osborne, <i>ex parte</i> ...	171
O'Shea v. Port Elizabeth Municipality ...	169, 173
Otto, <i>re</i> ...	129
Oudtshoorn Municipality v. Lind ...	363
Parkin v. Lippert 65, 129, 141, 211,	257
Peel, <i>ex parte</i> ...	380
Pelzer v. Matona... ..	482
Pentony v. Porter ...	159
Perks v. Carroll's Executrix ...	399

	PAGE		PAGE
Perrin's Estate, <i>re</i>	472	Regina v. Sym	13
Petersen v. De Kock	482	„ v. Tally September	263
Petersen v. Frame and Wife	1, 187	„ v. Van Rooyen	220
Peterson v. Biccard	2	„ v. Vedders	159
Phillips v. Burger	146	„ v. Vlak	68
Pienaar v. Rattray	67	„ v. Vyfer and Jaftha	66
Pilgram, <i>ex parte</i>	2	„ v. Ware	21
Poppe, <i>ex parte</i>	167	„ v. Wessels	7
Poppe v. Bate & Co.	367	„ v. Williams	20
Potgieter, <i>ex parte</i>	266	„ v Zwart and Jantjes	140
Power v. Hunter... ..	429	Renfrew v. Renfrew	281
Preim v. Winter	331	Roberts v. Roberts	37
Preiss, <i>ex parte</i>	224	Rodgers's Estate, <i>re</i>	169
Pretorius v. Greeff	19, 99	„ Executors v. Jessop	95
Price, <i>ex parte</i>	224	Rodwell, <i>ex parte</i>	380
Priest, <i>ex parte</i>	380	Rolfe, Nebels & Co. v. Curtis	187
Prince, Vincent & Co. v. Landau	57	Rosenthal, <i>ex parte</i>	34
Prins v. Roux	224	Ross, <i>ex parte</i>	256
Provident I. & T. Co., <i>re</i>	2	Ross v. Farmer	3, 13, 34
Purcell v. Maree	370	Ross & Co. v. Lotze	129
„ v. Van Rensburg	459	Rossouw, <i>ex parte</i>	2
Rademeyer v. Van der Merwe	475	Rossouw's Executors v. Oliver and Others	399
Rainier v. La Grange	416	Rothenburg v. Rothenburg, 228, 255, 259, 303, 354	
Rakiep and Others, <i>ex parte</i>	418	Roussouw's Executor v. Olivier	323
Randall v. Grey.— <i>Re</i> The “ Blairhoyle,” 395, 420, 465		Roux's Estate, <i>re</i>	72
Raphael, <i>ex parte</i>	98	Rowe's Insolvent Estate, <i>re</i>	72
Raubenheimer v. Parsons and The George Licensing Court	383	Row's Executrix v. Dalton	256
Rautenbach v. Ferreira	172, 276	„ v. Lamprecht... ..	256
Regina v. Abraham and Others... ..	66	Rowsell v. De Stadler	402
„ v. Albert	281	Rudd v. Rudd	162
„ v. Allies	185	Russell, <i>ex parte</i>	58
„ v. Blauwveroi	53	Russouw, <i>ex parte</i>	167
„ v. Boi Lockenburg	369	Russouw, <i>ex parte</i>	210
„ v. Bredenkamp	389	Scheepers v. Scheepers	228, 259
„ v. Davis and Others	392	Schmidt v. Schmidt's Executors	71
„ v. De Windeck	399	Schnitzler & Peycke, <i>ex parte</i>	312
„ v. Erfurt	432	Schoeman v. Heyns	426
„ v. Hunt and Another	488	Scholtz v. Burkes	148
„ v. Keyter	159	„ v. Du Plessis	2
„ v. Klaas	9	Schonkin's Estate, <i>re</i>	313
„ v. Kock	80	Schoombie's Executors v. Stassen	370
„ v. Loftus	469	Schreiner and Silke, <i>ex parte</i> .— <i>Re</i> Reitz's Will	367
„ v. Neethling	65	Schultz v. Stefanis	424
„ v. Piet Phaatjes	372	Schunke's Insolvent Estate, <i>re</i>	229
„ v. Roos	344	„ Trustees v. Van Gass	275
„ v. Sigcau	290	Scott v. Dodwell	129
„ v. Swart	426		

TABLE OF CASES.

vii

	PAGE		PAGE
Scott v. Gillet	296	Stofberg v. King	290
„ v. McColla	352, 401	Stoffels v. Mills & Rethman (Limited)...	29
Scott's Estate, <i>re</i>	187	Stoney, <i>ex parte</i>	10
Seale v. Seale	170	Strachan's Executor v. Vries	381
Searle v. Parsons and The George Licen- sing Court	374	Strasturger v. Trebor Frères	76
Searle & Sons v. Horsfall	14	Strydom v. Strydom's Trustee	140, 144
Seaville v. Grobbelaar	276	Strydom's Trustee v. Strydom	255, 292
Serrurier v. Serrurier	354	Sturk & Co. v. Reeler	146
Sharp, <i>ex parte</i>	139	Stuurman's Estate, <i>re</i>	71, 148
„ v. Sharp	169, 275	Sutherland Municipality, <i>ex parte</i>	153
Sheard's Trustees v. Van Rensburg	445	Sutton (Minors), <i>re</i>	173
Short & Co v. Schiemann	98	Sypkens, <i>ex parte</i>	465
Sieberhagen, <i>re</i>	153	Tabata and Others, <i>ex parte</i>	71
„ v. Albertyn... ..	366	Tasmer's Estate, <i>re</i>	159
Sigcan v. The Queen	268	Taylor, <i>ex parte</i>	371
Simons v. Simons	94, 169, 221	Taysen v. Jonker	302
Slabber v. Neezer's Executor	130, 189	Tennant v. Nortje	98
Slabber's Insolvent Estate, <i>re</i>	60	Teubes v. Burger	275
Slebusch, <i>re</i>	20	Theron v. Barnard	207
Small, <i>re</i>	429	„ v. Van Aarde and Another	338
Smidt's Trustees v. De Villiers	370	Thiele v. Daniels... ..	259
Smith, <i>re</i>	258	Thoma's Estate, <i>re</i>	286
Smith, <i>ex parte</i>	417	Thwait's v. Brand... ..	14
Smith, <i>ex parte</i> .— <i>Re</i> Titterton's Estate	17	Titterton's Estate, <i>re</i>	489
Smith v. Smith	20, 99, 211, 380	Town Council v. Murison	370
„ v. Black's Executors	167	„ v. Smuts	2
„ v. Momberg and Others	300	„ v. Soeker	427
„ v. Theron	128	Toucher v. Zoor	201
„ v. Nieuwstadt	445	Trautmann v. Imperial Fire Assurance Co.	68
Smuts, <i>ex parte</i>	275	Trollip, <i>re</i>	258
Smuts' Trustees v. Van Zyl's Executors	91	Trollip's Estate, <i>re</i>	225
Snyman's Estate, <i>re</i>	143	Trerwer, <i>ex parte</i>	36
Somervell Bros. v. Cuthbert & Co.	266	Trustees Diocese of Cape Town v. Engelbregt	416
South African Association v. Honey	224	Truter v. Truter	14, 80
„ Mutual v. Mannix	149	Turner, <i>ex parte</i>	147
„ „ v. Rorich	149	Twentyman & Co. v. Zaren	187
Spies (Minors), <i>re</i>	36	Union Bank (in liquidation), <i>re</i>	255, 355
Spolander, <i>re</i>	254	Union Gold Mining Co., <i>re</i>	2
St. Leger v. Town Council of Cape Town	264	Vallance, <i>ex parte</i>	285
Standard Bank v. Hay	224	Van Aardt v. Jefferson	1, 350
„ v. Marais	364	Van Bloemtsen v. Orchard	14
„ v. Uys	146	Van den Heever (Minors), <i>re</i>	188
„ v. Wright	416	Van der Byl, <i>ex parte</i>	369
Starck v. Starck	313, 367, 388, 477	„ „ v. Reyneke	209
St. Croix v. St. Croix	370	„ „ & Co. v. Uren	458
Steenkamp's Executors v. Wiese	60		
Steyn's Estate, <i>re</i>	211		
„ Trustee v. Gous... ..	140		
Stockdale v. Van Zyl & Another	14		

INDEX OF TITLES IN THE DIGEST.

	PAGE		PAGE
Administration Account ...	149	Guarantee ...	76
Adultery ...	282	Habitual Drunkard ...	185
Advocate ...	143, 148	Husband and Wife ...	225, 284, 442
Appeal ...	172, 268		
" to Privy Council ...	290, 465	Insolvency ...	157, 185, 188, 230, 257, 268, 483
Arbitration... ..	180, 429	Insolvent Ordinance ...	211
Articled Clerk ...	228, 483	Interdict ...	151, 292, 360
Assumption, Substitution and Surrogation	17	Interpleader Suit ...	161, 223
Attachment ...	1, 13, 401		
Attorney ...	872, 488	Jurisdiction ...	409
Auditor ...	451		
		Lessor and Lessee ...	132, 327, 414
Bail ...	488	Liberty of the Subject ...	268
Barring Appeal ...	402	Liquor ...	7, 20, 159, 383, 389
Breach of Contract ...	455	Lunatic ...	226
Building Contract ...	82		
		Magistrate ...	394
Cession of Territory ...	107	Magistrate's Court ...	56, 155, 392, 474
Child ...	281	Magistrate's Jurisdiction ...	25, 53, 137, 412
Civil Imprisonment ...	26, 256	<i>Mandamus</i> ...	467
Commission <i>de bene esse</i> ...	466	Marital Power ...	36, 99
Commissioner of Supreme Court ...	261	Married Woman ...	417
Commitment to custody ...	153	Master and Servant ...	372
Company ...	9, 261	Master of Supreme Court ...	428
Conditions of Sale ...	296	Mines and Minerals ...	4
Construction of Agreement ...	100	Minor ...	35, 59, 72, 207, 285, 485
Convict ...	899	Misjoinder ...	165
Conviction ...	432	Missionary Institution ...	163
Costs ...	84, 229, 427, 484		
Crown Lands ...	209	Negligence ...	41
Culpable Insolvency ...	160	Notice of Appeal ...	264
<i>Curator bonis</i> ...	368		
		Partners ...	67
Deaf Mute ...	254	Partnership ...	6, 375
Declaration of Rights ...	439	Pauper Suit ...	431
Derelict Lands Act ...	381	Plea in Abatement ...	68
Diamond Mine ...	194, 235	Post-nuptial Contract... ..	371
Discovery ...	100	Pounds Acts ...	390
Divisional Councils Act ...	374	Prescription ...	27, 241
Divorce ...	259, 260	Principal and Agent ...	184, 333, 344, 434
Donation ...	189	Proclamation ...	21
Double costs ...	416	Provisional Sentence ...	3, 364, 373
		Public Body ...	173
Ejectment ...	424	Public Road ...	286
Execution of Municipal Commissioners ...	445		
Execution ...	420	Receipts ...	91
Executor ...	157, 253, 353, 367, 464	Rent ...	95, 329
		Repealed Proclamation ...	392
False Imprisonment ...	475	Restraint on Alienation ...	300
Farm ...	277	Rule 36, 319 ...	366, 352
General Average ...	53	Sale ...	38, 144, 331, 447, 461

				PAGE					PAGE
Salvage	...	...	...	338, 395	Transfer Duty	...	...	...	105
Servant	...	...	...	... 417	Trial	...	...	...	58, 437
Servitude	...	...	...	... 264	Trustee	...	...	...	282, 361, 418
Setting aside Judgment	...	...	...	... 23	Tutors	...	...	...	... 167
Shares	...	...	...	... 31	Undue Preference	...	...	...	298, 313, 323
Slander	...	...	...	... 136	Usufruct	...	...	...	14, 211
Small Debt...	...	...	...	... 402	Voluntary Escape	...	...	...	... 469
Special Justice of the Peace	...	...	...	... 140	.				
Splitting of Claims	...	...	...	... 24	Waiver of Rights	...	...	...	60
Stale Demand	...	...	...	... 413	Warrant of Apprehension	...	...	...	350
Summons	...	...	...	29, 370	Water Concession	...	...	...	478
Tender	...	...	...	... 100	Watermill	...	...	...	303
Theft	...	...	...	...12, 65, 369, 426	Will	150, 248, 253, 377, 388, 403, 459, 472, 487			
Trade Mark	...	...	...	266, 330	Writ of Arrest	...	...	...	136
Transfer Deeds	...	...	...	... 260					



CASES DECIDED IN THE SUPREME COURT, CAPE COLONY.

SUPREME COURT.

[Before Sir HENRY DE VILLIERS, K.C.M.G.
(Chief Justice).]

REGINA V. BOI LOCKENBERG. } 1895.
Oct. 12th.

Th ft—False pretences—Promise to perform
work.

Where a person had obtained goods on a promise to perform work in return for the value of the goods and failed to fulfil his promise,

Held, that he could not be convicted of theft by means of false pretences.

This case came on review from the Acting Resident Magistrate of Beaufort West. The accused was charged with theft by means of false pretences in that upon or about the 1st January, 1895, and at or near Breyerspoort in the district of Beaufort West the prisoner did wrongfully, unlawfully, and falsely obtain from one Jacobus Pienaar, his master, certain goods and provisions, and then and there did pretend to the said Pienaar that he should perform work in return for the value of the goods and provisions supplied to him, and did then and there by means of the said false pretences induce the said Pienaar to supply him with certain goods (specified in the summons) whereas in fact as he the said Boi Lockenberg at the time he so pretended well knew that he had no intention to perform the work aforesaid for the said Pienaar in return for the value of the goods and provisions aforesaid, and thus the said Boi Lockenberg did commit the crime of theft by means of false pretences. There was a further count charging the prisoner with obtaining goods under a similar promise or perform certain services for Pienaar.

The prisoner was found guilty, and sentenced to receive twenty-five lashes and to be imprisoned for two months with hard labour.

The Chief Justice said: The prisoner no doubt rendered himself liable to a civil action, or to a prosecution under the Masters and Servants

Act, but the case was not one of theft. There is no difference in the present case from that of a person who bought goods on credit, knowing at the time that he was unable to pay for them. The knowledge that he was unable to pay would not render him liable to a prosecution for theft. He might be liable to a civil action, or he might be liable to be charged with fraud, but he could not be charged with theft. I have spoken to the Attorney-General, and he agrees with my view that the conviction ought to be quashed. In the Eastern Districts Court, in the case of the *Queen v. Casey* (5 E.D.C., 179), a similar decision was arrived at. In my opinion, therefore, the conviction must be quashed.

ADMISSIONS.

Ex parte VAN DER BYL.

Mr. Close moved for the admission of Mr. Vincent Alexander van der Byl as an attorney, notary and conveyancer.

Mr. Van der Byl took the oaths and was duly admitted.

Ex parte FOURIE.

Mr. Close moved for the admission of Mr. Jonathan Adriaan Fourie as a translator. The application was granted; the oaths to be taken before the Resident Magistrate, Colesberg.

Ex parte CHAMPION.

Mr. Buchanan moved for the admission of Mr. Louis James Champion as an attorney and notary.

Ordered as prayed; the oaths to be taken before the Registrar at Kimberley.

PROVISIONAL ROLL.

MILLER V. VAN AARDE.

Mr. Graham applied for the final adjudication of defendant's estate.

The order was granted.

HOFMEYR V. DU TOIT.

Mr. Molteno moved for provisional sentence for £200, interest at the rate of 6 per cent. on a capital of £2,500 from 15th March, 1894, to 12th June, 1895, upon a mortgage bond passed in favour of the Cape of Good Hope Savings Bank by defendant, and by them ceded to plaintiff; also that the property specially mortgaged be declared executable.

Order granted as prayed.

COLONIAL ORPHAN CHAMBER V. BOTHA.

Mr. Buchanan moved that the provisional order of sequestration of the defendant's estate might be superseded.

Order granted.

SCHOONBIE'S EXECUTOR V. STASSEN.

Mr. Buchanan moved for provisional sentence for £1,000 on a mortgage bond, with interest at 5½ per cent.; also that the property specially mortgaged be declared executable.

The order was granted.

WHELAN V. WODEHOUSE.

Mr. Buchanan applied for provisional sentence for £45, less £15 ls. 10d., on a promissory note.

Granted.

SMIDT'S TRUSTEE V. DE VILLIERS.

Mr. Buchanan moved for provisional sentence for £100 on a promissory note.

Granted.

TOWN COUNCIL V. MURISON.

Mr. Buchanan moved for judgment under rule 329 for £49 15s., arrears of rates.

Granted.

REHABILITATIONS.

The following rehabilitations were granted on motion from the Bar: William Lourens Zietsman and Jan Jacob Kritzing Olivier.

PURCELL V. MARE. { 1895.
Oct. 12th.

Summons—Defective return.

Where on a claim for provisional sentence the return on the summons had not been made by the Deputy Sheriff, the Court ordered the case to stand over for an amended return.

Prayer for provisional sentence on a mortgage bond for £500, with interest at 5 per cent. from 1st July, 1893.

The following was the return on the summons: On the 4th October, 1895, I duly served the within summons upon the within-named defendant by handing his wife a copy of the same, together with a copy of the within-mentioned mortgage bond, at the same time explaining to her the nature and exigency thereof. The said defendant was away from home at the time.

W.W.,

For Deputy Sheriff.

Declared before me at Matatiele

this 4th day of October, 1895.

DRUMMOND ELLIOT, J.P.

The Registrar directed the attention of the Court to the fact that the return on the summons was not signed by the Deputy Sheriff.

Mr. Buchanan moved, and pointed out that although the return had not been made by the Deputy Sheriff, the declaration of due service had been made before him.

The Chief Justice: But there is nothing on the record to show that Mr. Drummond Elliot is the Deputy Sheriff. The matter had better stand over *sine die*, so that the return may be amended in terms of the Rule of Court.*

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné.]

THE PETITION OF EDWARD D. DEARHAM.

Mr. Close, on behalf of petitioner, moved for leave to sue by edictal citation in an action against his wife for restitution of conjugal rights, failing which for divorce. by reason of her malicious desertion; also for the custody of the minor children and the forfeiture by his wife of her half-share in the community of property.

Leave was granted, the return day being fixed for November 25.

THE PETITION OF ADA M. DE ST. CROIX.

Mr. Molteno moved on behalf of the petitioner for leave to sue by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion. Petitioner's husband had gone to Johannesburg, and for the last four months had written to her only once, and had contributed nothing to her support.

The order was granted, the summons to be effected personally, and to be returnable on the last day of the November term.

* Afterwards on the 1st November following, the return having been amended, provisional sentence was granted as prayed. R.R.P.

IN THE MATTER OF THE KAFFRARIAN
COLONIAL BANK, LIMITED.

Mr. Rose-Innes, Q.C., moved for an order placing the said bank under the provisions of the Winding-up Act of 1868, appointing official liquidators with the necessary powers, and fixing a certain day, on or before which creditors shall prove their debts or claims.

An order was granted appointing the petitioners, Messrs. Lonsdale and Christian, as official liquidators, with powers mentioned in the 15th section of the Act of 1868, the 1st February to be fixed as the last day for proving claims, and that advertisements be published in the "Government Gazette," and in the "Kaffrarian Watchman" and in the "Cape Mercury."

IN THE ESTATE OF THE LATE JOHANNES
J. HUMAN.

Mr. Graham moved for authority to the Registrar of Deeds to pass transfer of certain portions of the farms Doorn Vlake and Zand Vlake, situated in the division of Alexandria, to certain heirs thereof, without the production of any act of repudiation by other joint heirs of the special right of purchase given to them by the will of the said Johannes J. Human.

A rule nisi was granted calling upon whom it might concern to show cause upon November 14 why authority should not be granted to the Registrar as prayed. The rule to be published in the "Government Gazette," copies to be sent by post (prepaid) to those sons whose places of residence are known.

THE UNION BANK, IN LIQUIDATION.

Mr. Rose-Innes, Q.C., moved for an order in terms of the sixth report of the official liquidators.

An order was made confirming the report.

IN THE INSOLVENT ESTATE OF GEORGE
WOOD, JUN.

Mr. Molteno moved for an order authorising James B. Brown, sole surviving trustee of the said estate, to finally liquidate the same.

The application was granted.

IN THE MATTER OF THE MINORS NEL.

Mr. Molteno moved for an order authorising the partition between the said minors and their father, Hans J. Nel, of certain perpetual quit-rent place called Vaalklip, in the district of Somerset East, at present held jointly, a division of the same having been agreed upon which will be for the benefit of the said minors.

The order was granted.

IN THE INSOLVENT ESTATE OF GEORGE D.
BRUNETTE.

Mr. Webber moved for authority to the Master of the Supreme Court to call a meeting of creditors of the said estate for the purpose of electing a new trustee in place of the late Jacobus T. G. Pietersen, in order that certain land at Gordon's Bay, an asset of the estate, may be dealt with.

The order was granted.

Ex parte TAYLOR. { 1895.
Oct. 12th.

Post-nuptial contract—Registration.

Where parties had married in England with the intention of excluding community, but had not entered into an ante-nuptial contract, the Court authorised the registration of a post-nuptial contract executed by them on their arrival in the Colony.

This was the petition of Alfred Taylor and Florence Adelaide Taylor his wife.

The first-named petitioner was born in England, and came to this country about six years ago with the object of entering into business here.

He recently returned to England, and there became engaged to and married the second-named petitioner.

At the time of entering into the marriage the petitioners were informed that the marriage having occurred in England they would enjoy the benefits of the English Married Woman's Property Act of 1882, and were advised that nothing could be done in England to protect them against the operation of the law at the Cape, if such law would operate in respect of the wife's estate, and that any document which would have to be executed, would have to be executed by them upon their arrival at the Cape.

The marriage was thereupon entered into between the petitioners upon the distinct understanding and under the impression that the wife would as an Englishwoman enjoy the benefits of the Act of 1882 and that her husband would have no right in law to any part of her estate, or in any way be able to control the same against her wishes.

Sixteen days after the marriage the petitioners sailed for the Cape, and the day after their arrival the husband went to his attorneys and instructed them to draw up a deed of settlement excluding community.

He was informed that the marriage having been solemnised such a deed would have no

validity against third parties unless, under the circumstances stated, a deed of agreement between the parties was permitted to be registered as if it had been an ante-nuptial contract, and that unless the Courts held that the marriage was governed by the Married Woman's Property Act, 1882, the law of this Colony with regard to community would apply, and that the wife could not claim to keep for herself the right to and administration of her own property, at all events in so far as it might become situate in this colony.

The petitioners alleged that Mrs. Taylor had an estate of her own, and that she entered into the marriage under the impression and belief that her husband would have no right whatever in law to any part of her estate, or in any way be able to control the same against her wishes, and that both of them entered into the marriage with the intention of excluding community.

They alleged that they had entered into a post-nuptial agreement, which the Registrar of Deeds refused to register without an order of Court.

The prayer was for an order authorising the Registrar of Deeds to register the post-nuptial contract as if it had been executed prior to the marriage.

Mr. Juta, Q.C., for the petitioners relied on *Ex parte Kricker and wife* (2 Sheil, 312), and *Schoombie v. Schoombie's Trustees* (5 Juta, 189).

The Court granted the order as prayed, without prejudice to the rights required by creditors up to the date of the registration of the contract.

[Petitioner's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

INCORPORATED LAW SOCIETY V. { 1895.
BICCARD. } Oct. 12th.

Attorney—Conviction on charge of culpable insolvency—Suspension—Certificates.

Where an attorney had been convicted of culpable insolvency,

The Court, on the application of the Incorporated Law Society, suspended the attorney from practice until the further order of the Court, and directed that no application should be made for his reinstatement until three years had elapsed from the date of the Court's order.

The Court further directed the attorney to deliver his certificates to the Registrar.

This was an application on notice to the respondent calling upon him to show cause why

he should not be struck off the roll of attorneys and notaries, or otherwise punished, by reason of his having been found guilty of the crime of culpable insolvency and sentenced to six months' imprisonment with hard labour.

The respondent was also notified that he would be required to deliver to the Registrar of the Court his certificates of admission as an attorney and notary, and to show cause why he should not pay the costs of the application.

The President of the Law Society filed an affidavit to the effect that the respondent was at the Circuit Court held at Malmesbury last month tried upon the indictment annexed to the affidavit for theft and culpable insolvency, and was convicted by the latter and sentenced to six months' hard labour.

Mr. Innes, Q.C.: The Law Society leave it in the hands of the Court as to whether the respondent should be struck off the rolls or only suspended for a time, as in the case of *Walker* (4 Sheil, 397).

There was no appearance for the respondent.

The Chief Justice said: It is the first offence of the respondent, and the Court does not wish to ruin him for the rest of his life. I think it well, therefore, that a similar order to that made in *Walker's Case* should be made, viz., that the respondent be suspended from practice until the further order of the Court, and that no application for his reinstatement be made for three years from this date, and that he be ordered to hand his certificates to the Registrar of the Court.

[Attorneys for the Law Society, Messrs. Van Zyl & Buissinné.]

SUPREME COURT.

[Before Sir HENRY DE VILLIERS, K.C.M.G.
(Chief Justice).]

REGINA V. PIET PLAATJES. } 1895.
Oct. 14th.

Master and servant—Act 18 of 1873, section 2, sub-section (8).

Conviction for a contravention of Act 18 of 1873, section 2, sub-section (8), quashed, where the language complained of had not been set forth in the summons and the case had been tried and the sentence passed by the prisoner's master, a S.J.P.

This case came on review from Mr. J. J. le S. van der Byl, the S.J.P., Van der Byl's Kraal, district of Beaufort West.

The accused was charged with the crime of contravening section 2, paragraph 8 of Act 18 of 1873, in that upon or about the 24th day of September, 1895, and at or near Van der Byl's Kraal, the said Piet Plaatjes did wrongfully and unlawfully make use of abusive and insulting language towards his master, Mr. J. J. le S. van der Byl, calculated to provoke a breach of the peace.

J. L. Erasmus gave the following evidence: I reside here at Van der Byl's Kraal, and am employed as constable upon special occasions. I know the prisoner. He is in the employ of Mr. Van der Byl here. Last evening his master had occasion to scold him for having left the stable door open, on account of which the fowls had got into the stable and had eaten the forage which had been prepared for the mules. The prisoner contradicted his master repeatedly and made use of abusive language, and also made insulting remarks about Mr. Van der Byl's children. I then arrested the prisoner. He was quite sober.

The prisoner pleaded not guilty. He was found guilty, and sentenced to pay a fine of £2 or fourteen days' hard labour.

The Chief Justice, after referring to the fact that the prisoner's master was the same Mr. Van der Byl who tried the case, said: No principle is clearer than that a person should not be a judge in his own cause. In the present case the actual words used are not stated in the summons, but a person, when spoken to roughly, is apt to regard such expressions as insulting, when an impartial observer would not look upon the words in that light. As the language complained of has not been set forth in the summons, it is impossible to form any opinion regarding them; but in any case it should be borne in mind that justices of the peace and magistrates should not sit in cases in which they are personally concerned. If this case had been sufficiently serious, someone might have been appointed to act for the Justice of the Peace, or the prisoner might have been tried before a magistrate. I have conferred with the Attorney-General and he agrees with me that the conviction should be quashed.

VAN DER WALT V. KRUGER, PELSER & CO. 1895.
(Oct. 14th.)

Provisional sentence—Promissory note.

Provisional sentence was granted on a promissory note where the defence was set up that the plaintiff was not the bona-fide holder for value of the note.

Prayer for provisional sentence on a promissory note for £520 3s. 1d., dated 11th May, 1895, and payable at the Standard Bank, Burghersdorp, on the 11th September, 1895, made by the defendants in their firm name in favour of the plaintiff (Mrs. H. J. van der Walt, the wife of one of the partners of the defendant firm), together with interest from 11th September, 1895.

The defence was: (1) That the plaintiff, who is married by ante-nuptial contract to her husband, was not the real and *bona-fide* holder for value of the note, that she was not legally entitled to the value of the note, but that her husband was the person to whom the amount of the note belonged, and that the transference of the obligation into the plaintiff's name was merely a subterfuge, and was done with the intention of defeating Van der Walt's creditors. (2) That the plaintiff's husband was indebted to the defendant firm in the sum of £387 8s. 4d., for which summons had been issued.

Van der Walt filed an affidavit denying the above allegations, and that he was indebted to the firm in the sum of £387 8s. 4d.

Mr. Juta, Q.C., for the plaintiff.

Mr. Rose-Innes, Q.C., for the defendants.

Provisional sentence was granted.

The Chief Justice said: I am of opinion in this case that provisional sentence ought to be granted. Even if provisional sentence is granted it will be quite competent for the defendants to enter appearance and the plaintiff will then have to go into the principal case, and all the questions that have been raised can then be entered into. The only question now is whether provisional sentence can be given or not. Well, a good deal has been said about an intention on the part of the plaintiff's husband to defraud his creditors; but it appears that on the 1st August, when this promissory note was passed in favour of the plaintiff, there was no intention on Van der Walt's part to defraud creditors. The defendants gave the plaintiff this note, and she is entitled to claim the amount until it is clearly proved that there was an intention to defraud; because the proof of fraud lies upon those who assert it, and I cannot hold on the evidence that there has been proof of fraud on the part of the plaintiff. If the money is paid, she will have to give security pending the hearing of the principal case; and I think, if the actions are brought, they should be consolidated so as to save expense. Provisional sentence will be granted with costs.

[Plaintiff's Attorney, G. Montgomery-Walker; Defendants' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

SEARLE V. PARSONS AND THE
CHAIRMAN OF THE GEORGE
DIVISIONAL COUNCIL. { 1895.
Oct. 14th.

Divisional Councils Act, 1889, sections 4, 30
and 82—"Contractor"—Lessee.

*Held, that a lessee of premises vested in a
Divisional Council is not a contractor
within the meaning of section 4 of the Act,
and is not incapacitated by section 82 from
holding office as a member of the Council*

This matter came before the Court on notice to the respondents that they would be required to show cause why the seat of the first-named respondent as a member of the Divisional Council of George should not be declared vacant, by reason of his being concerned in a contract with the said Council, and thus having become a contractor of the Council in terms of the Divisional Councils Act, and further why the ruling of the Chairman of the said Council, the second-named respondent, laid down at the meeting of the said Council held on the 13th day of September last should not be set aside, and why the first-named respondent should not pay the costs of the application.

The facts are as follow :

The applicant and the first-named respondent are both members of the Divisional Council of George. The second-named respondent as Civil Commissioner of the district and as such Chairman of the Council.

The Council owns a house and land situated in the division of George on the main road to Oudtshoorn called the North Station.*

On the 12th April last tenders were called for the lease of the North Station, one of the stipulations being that the successful tenderer should be bound to open a wayside inn or house of accommodation for the use of travellers and others using the road, and the notice calling for tenders was duly published in the local newspaper, the "George and Knysna Herald."

On the 10th May last the only tender received was opened, the tenderer being the first-named respondent, and his tender was accepted by the Council. Parsons was present at the meeting but took no part in the discussion, nor did he vote.

On the 9th August last a lease of the North Station was entered into between the Council and Parsons. The tenancy was to be for three years at a yearly rental of £20, payable quarterly.

* The property belongs to the Government, but is vested in the Divisional Council. REP.

After the lease had been executed Parsons retained his seat as a member of the Council.

At a meeting of the Council held on the 13th September last the applicant protested against the legality of allowing Parsons to retain his seat as a member of the Council, he having, as the applicant contended, become a contractor of the Council, and in support of his contention read an opinion of counsel which agreed with the applicant's view.

The Chairman, the second-named respondent, ruled that Parsons was not a contractor within the meaning of the Divisional Councils Act.

After some further discussion Parsons left the meeting without prejudice to his contention, and on the understanding that the applicant would test the question in a friendly manner in a competent Court.

Mr. Rose-Innes, Q.C., for the applicant.

The application is based on section 30 of Act 40 of 1889, which is under the chapter dealing with the qualification of Councillors. Participation in the profit of any contract is equivalent to disqualification. This includes, it is submitted, contracts under which the Councillor pays money to the Council as well as those under which he draws money from the Council. He may purchase at public sale but he may not lease. Did that section stand alone no question would be possible, but see section 82, (c), (d), (g).

A contractor under any contract in terms of section (g) would naturally mean one who enters into any contract, but a contractor is defined in section 4, and that definition has given rise to the present dispute.

It will be contended for the respondent that a contractor is one to whom money or valuable consideration is paid for goods or services supplied and not one who pays money for things or rights given to him by the Council.

This distinction would be arbitrary and illogical. The reason for binding contracts is clear as being against public policy, but they are equally so whether the Councillor pays money or consideration, or receives money as consideration.

It is submitted that unless it is clear that the Legislature intended to exclude from the term "contractor" all persons who paid the Council for something the Court would give a wide meaning to the term.

If the Court should be against us on the first point then we rely on section 30, in which the word contractor is not mentioned. The respondent is clearly concerned in a contract. Some effect must be given to section 30.

The Attorney-General (Mr. Schreiner, Q.C.) was not called on, but by leave of the Court he

referred to Act 4 of 1865, sections 14 and 75; to Act 45 of 1882, sections 17, 22; and to Act 40 of 1889, sections 241 and 242.

Mr. Rose-Innes, Q.C., replied.

The Court refused the application with costs.

The Chief Justice said: A great part of Mr. Innes's argument has been directed against the policy of allowing a lessee of a Council to become or remain a Councillor, but after all we have not to deal with the policy of the law, but with the actual provisions of the law, which the Court had now to construe. The Divisional Council Act of 1889 is really a consolidating Act, and it is the duty of the Court to construe any particular section of this Act, if possible, in such a way as to make it consistent with the remaining portions of the Act. Now I quite agree that if the 30th section stood alone the respondent would not be entitled to hold his position as a member of the Divisional Council, because undoubtedly he has entered into a contract with the Divisional Council, and he would be excluded by the 30th section, but then comes the 82nd section, which goes into details as to what is to be done in case a Councillor becomes incapacitated from holding his office, and it provides that the office of any Councillor shall become vacant in case certain events shall happen; one of the events, under sub-section (g), is in case he shall become a contractor under any contract with the Council of which he is a Councillor. If, therefore, the word "contractor" has been defined in any portion of this Act, I think that definition ought to control not only the 82nd section, but also the 30th section. We refer then to the 4th section, which is an interpretation clause, and if the interpretation of "contractor" is such as not to exclude the respondent, I think the Court is bound to give effect to such construction. Now the definition given is this: "Contractor shall mean every person who directly or indirectly has a pecuniary or valuable interest in any money or other valuable consideration paid or given or to be paid or given by any Council for services performed, for work or labour done, or for any goods or things of whatsoever nature or kind bought or hired by or supplied to such Council." Now in my opinion these words cannot be held to exclude the respondent, unless the Court now inserts the word "let" after hired, so as to make it read "bought or hired or let, &c." The Legislature has chosen to confine the term contractor to cases where the hiring takes place by the Council, and not where letting takes place by the Council, and I do not see how the Court can, after the deliberate expression of opinion by the Legislature as to what the word "contractor"

means, give it a wider meaning because the policy of the law may require it. The Legislature has to enact its own policy, and by this definition of the term the Legislature has excluded the wider definition Mr. Innes now puts upon it. On these simple grounds, I am of opinion that the Magistrate was right in his ruling, that the respondent is entitled to his seat, and that the application must be dismissed with costs.

[Applicant's Attorney, C. C. de Villiers; Respondents' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

VAN DER WALT V. PELSER. { 1895.
Oct. 14th.

Partnership—Inspection of books—Independent accountant.

Partner in a mercantile business, unacquainted with bookkeeping, held entitled to inspect the books of the firm assisted by an independent accountant.

This was an application on notice to the respondent that he would be required to show cause why he should not be ordered to permit the applicant, accompanied by his accountant, Mr. Fincham, or other competent accountant, to inspect the books, stock list and stock, and other the documents and assets of the firm of Kruger, Pelsner & Co., whereof he is a partner, and that at all reasonable times, and to take extracts from such books, lists and documents, or in the alternative, why he (the respondent) should not be ordered to go to arbitration on the claim of the applicant to make such inspection assisted as aforesaid; also why he should not be adjudged to pay the costs of these proceedings, or why such further or other order should not be pronounced in the premises as to the Court should seem proper.

The applicant alleged that on 23rd August, 1895, the firm of Kruger, Pelsner & Co., of which he is a partner, issued summons against him for £487 ss. 4d.

That he intended to dispute this claim, as he had a much larger claim against the firm for damage sustained by reason of his having become a partner in the firm through the false representations of the respondent.

That in terms of the deed of partnership (paragraph 7) it was provided that the business of the firm should be managed by the respondent, and that it was also provided (paragraph 17) that all the partners should have the right at all reasonable times to inspect the book of the partnership.

After referring to a meeting of the partners which was held on the 9th May, 1895, when it was resolved to liquidate the business, the respondent being appointed liquidator, and decided that the books should be gone into with a view of arriving at the true amount of the firm's liabilities, and that a correct statement thereof should be submitted at another meeting to be held within three weeks subsequent, and after further referring to the causes which induced his wife to apply for the sequestration of the firm's estate (*vide supra*, p. 263), the applicant went on to say: "I am satisfied that a correct statement of the affairs of the said partnership business was not submitted to this honourable Court by the defendants in the said proceedings, and I am desirous for my own protection of making a proper inspection of the books and stock, which I have hitherto been prevented from doing by the respondent.

"I am an illiterate man and have no knowledge of business books; having been brought up as a farmer. . . . I have personally and through my attorney made repeated application to the respondent to be allowed, accompanied by an independent accountant, to make the necessary inspections of the books and stock list, but without result—I am told that I may obtain information on inquiry, but that no outsider will be allowed admission. The respondent knows well that I cannot myself check the books or stock, and by refusing to allow me the assistance of my accountant he virtually refuses me admission to inspect.

"Mr. Fincham, the secretary of the Divisional Council, an independent and competent accountant, was prepared to assist me in the making of the said inspection, and I named him to the respondent as the party, whose assistance I proposed to avail myself of, but without result.

"I further offered to the respondent to go to arbitration on the question, having regard to the terms of paragraph 20 of the deed of partnership, but also without result.

"I feel that I am being grievously wronged and injured through the attitude of the respondent, whose statements and doings I have been unable to check by reason of his refusal to allow me the due access aforesaid."

The position taken up by the respondent was that he had always been willing to allow the applicant an inspection of the books but that he objected to their being inspected by an outsider, the firm's bookkeeper being ready and willing to afford any information required.

That such an inspection would greatly hamper the liquidation, as he and his bookkeeper were

engaged both day and night in preparing a statement of the first six months' liquidation which was to be presented to the partners on the 9th November.

He however expressed his willingness to allow the applicant and his accountant to inspect the books after the 2nd November.

Mr. Juta, Q.C., moved.

Mr. Rose-Innes, Q.C., for the respondent. The right to inspect the books is given to the partners under the deed of partnership, but apart from this every partner has a common-law right to inspect the books of the firm. See *Lindley on Partnership*, p. 831; *Greatrex v. Greatrex* (1 De G. and S., 692); *Muller v. Spence* (4 Juta, 46); *Stuart v. Lord Bute* (12 Sim., 460). This right has never been denied or disputed by the respondent, but he objects to an outsider inspecting the books. There is no authority to show that a partner has the right of allowing the books of a firm to be inspected by a stranger. In the present case all information can be obtained from the firm's bookkeeper.

It is submitted that the offer made by the respondent is a fair one and that the present application should be refused.

The Court granted the application.

The Chief Justice said: There appear to be no authorities on the point at issue, and I must therefore decide this case upon general principles. The applicant is an illiterate man. He does not properly understand the English language, and he certainly does not understand the keeping of books. He was induced to enter into this partnership, and after the short time that it existed, by agreement with all the partners it was arranged that liquidation should take place, and that the respondent should be the liquidator. Then the respondent gave notice to the applicant that he intended bringing an action against him to recover from him the amount due upon his share of the debts, upon which the applicant asked to be allowed to examine the books, assisted by a competent accountant. It is not alleged that this accountant is not a proper man to be employed for that purpose, or that the partnership would be in any way prejudiced by his inspection. It was only said that it is not convenient, when the respondent is engaged with the books, to allow the applicant to see them. This objection cannot be allowed. Ample opportunity ought to be afforded the applicant to inspect the books, assisted by the accountant. Under circumstances like those in this case a partner ought to be allowed not only to inspect the books, but to have assistance if required. There is no allegation that the partnership or the firm will be

prejudiced. It is not like a bank, which has secrets which ought not to be divulged, and it is impossible to see how the partnership can be prejudiced because an outside accountant is allowed to assist the applicant in inspecting the books. In my opinion the objection cannot be sustained. The applicant has shown good grounds for the order applied for, and he should be allowed to inspect the books assisted by a proper accountant. It is not alleged that Mr. Fincham, the person proposed, is not a fit and proper person for the work. I think the application should be granted, with costs. At the same time I think the taxing master, on taxing the costs between the parties, should not allow the mass of irrelevant matter in the affidavits to be taxed on either side. It is admitted that the affidavits contain much irrelevant matter. As to the right of the applicant, I think the respondent might well have allowed this man, illiterate as he is, to be assisted by Mr. Fincham for the purpose of seeing exactly the state of the partnership accounts. There is no principle more clearly established than that a partner must have free access to the books, and if it is clear to the Court that a partner cannot by himself understand the books, I think that unless it is shown that the inspection of the books would prejudice the firm, that such an inspection as prayed for ought to take place. The order will be granted with costs.

[Applicant's Attorney, G. Montgomery-Walker; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

GOEDHALS' EXECUTORS V. GOED- { 1895.
HALS' EXECUTOR. { Oct. 14th.

Will—Joint estate—Husband and wife—
Executors of first-dying—Executors of survivor.

A husband and wife, married in community, made their joint will by which the first-dying appointed the survivor together with the children of the marriage as his or her heirs, but directed that, unless the survivor should re-marry, he or she should remain in possession of the joint estate.

The testators further appointed the applicants as executors of the will.

The wife died first and the husband remained in possession of the estate.

The Executors took out letters of administration, but did not take possession of any of the assets.

The survivor, by his will, appointed the respondent as his executor.

Upon his death without having remarried,

Held, that the applicants, as executors of the first-dying, were entitled to take part with the respondent, as the executor of the survivor, in the realisation and division of the joint estate, and that they could not be excluded from a voice in the mode of realising the immovable property of such joint estate, although only the executor of the survivor, in whose name it was registered, could pass formal transfer.

This was an application by William Liebenberg and David Hendrik Jacobus Goedhals, in their capacity as executors testamentary of the estate of the late Johanna Cornelia Goedhals (born Lombaard), against Edward Wedel du Toit, in his capacity as secretary to the Graaff-Reinet Board of Executors (Limited), and as such executor testamentary of the estate of the late Jacobus Lodewicus Goedhals.

The petition set forth that Jacobus Lodewicus Goedhals and Johanna Cornelia Goedhals, his wife, on the 11th January, 1892, executed their joint last will and testament whereby they appointed the petitioners the executors of their will and administrators of their estate and effects.

That on the 23rd September, 1893, Johanna Cornelia Goedhals died, and thereafter on 21st October, 1893, the petitioners were by letters of confirmation confirmed in their appointment as executors of her estate.

That in terms of the will the survivor remained in possession of the joint estate of himself and his predeceased spouse until his death.

That Jacobus Lodewicus Goedhals, in consequence of the weak state of his health and consequent inability to manage his affairs, on the 11th December, 1893, granted a general power of attorney to Christoffel Jacobus Brugman, in his capacity as the secretary of the Midland Agency and Trust Company (Limited), Graaff-Reinet, to manage his affairs for him, and placed all his papers, moneys, acknowledgments of debt, and title deeds in the hands of the said secretary, who retained the same and managed his affairs until his death on 26th July, 1895.

That on Monday the 29th July, 1895, the petitioners had all necessary papers prepared and completed for the purpose of obtaining

under the joint last will and testament letters of administration authorising them to administer the estate of the late Jacobus Lodewicus Goedhals.

That about four o'clock in the afternoon of that day the petitioners received a note from the respondent stating that he held a will executed by the late Jacobus Lodewicus Goedhals of later date and that it could be inspected. That the said note was the first intimation that the petitioners had of the existence of a will of later date than the joint will aforesaid.

That on the 15th August last the Master of the Supreme Court granted letters of confirmation to the respondent to administer the estate of the late Jacobus Lodewicus Goedhals.

The petitioners, after referring to the correspondence which had passed between the parties, went on to say that they claimed that whatever the spouses died possessed of were assets in their estates in community, and should be realised as the assets of the estates in community by the executors of both estates, and that in all matters affecting or likely to affect the assets in community they have an equal voice with the executor of the estate of the late Jacobus Lodewicus Goedhals.

That the petitioners had no wish, after all matters affecting the assets, as the assets of the estates in community, had been arranged, and the realisation thereof, as such, had been completed, to interfere with the distribution of whatever might be found due to the estate of the late Jacobus Lodewicus Goedhals, but that his executor did not wish to recognise the petitioners' rights as above claimed.

The prayer was that the Court might be pleased to grant an order against the executor of the estate of Jacobus Lodewicus Goedhals granting the petitioners their claim and compelling him to recognise the petitioners in manner as claimed by them, or for such other relief as to the Court should seem meet, with costs.

The respondent filed an affidavit in reply in which he alleged *inter alia* that independent of the right claimed by him to administer the joint estate of J. L. Goedhals and his predeceased wife owing to the *dominium* thereof being vested in the survivor, J. L. Goedhals, of which estate he had been appointed as executor there were weighty reasons why the applicants' prayer to have an equal voice with him in the management of the joint estate should not be granted.

The chief reasons assigned were that both the applicants were indebted to the estate, the first-named applicant, a son-in-law of the testators, in the sum of £249, and the second applicant,

one of the testators' sons, in the sum of £488 10s., and also in the sum of £240, being arrear rent due under a lease.

For these and other reasons he alleged that it was not to the interests of the other heirs that the applicants should have the management of the estate.

Mr. Rose-Innes, Q.C., for the applicants, after stating the facts: The matter is not on all fours with any previous case. *Brand's Executor v. Brand's Executors* (4 Juta, 320) will be relied on for the respondent. But in that case the survivor was a fiduciary heir and consequently her executors could administer the entire estate, but they had consented to the appointment of an executor *ad litem*, and he was held entitled to administer the joint estate.

In the present case the survivor was a mere usufructuary. There is movable and immovable property belonging to the two estates.

The proposal of the applicants is fair, and should be entertained.

In *Visser's Case* the application dealt with a farm registered in the name of the survivor and his executors could consequently pass transfer, but that case has no application to the present.

The Attorney-General (Mr. Schreiner, Q.C.), for the respondent, relied on *Visser's Executors v. Registrar of Deeds and Others* (7 Juta, 98).

Mr. Innes replied.

Cur. ad vult.

Postea (1st November).

The Court delivered judgment.

De Villiers, C.J.: By the joint will of Goedhals and his wife, who were married in community, the first dying appointed the survivor together with the children of their marriage as his or her heirs, but directed that unless the survivor should remarry he or she should remain in possession of the joint estate. The testators further appointed the applicants as executors of the will and guardians of their minor heirs. The testatrix died first and the survivor remained in possession of the estate. The executors took out letters of administration, but did not obtain possession of any of the assets of the joint estate. The survivor, by his will, appointed the respondent as the executor of his estate. Upon the death of the survivor, without being remarried, the applicants, as executors under the first will, claimed the right to take part in the realisation of the joint assets, and to have an equal voice with the respondent in the administration of such joint assets. The respondent on the other hand, as the executor under the second will, claims the right to liquidate the joint estate without the assistance or interference of the applicants, offering, however, to charge commission only

upon one-half of the joint estate, and to hand over the other half, less a child's portion, to the applicants for distribution in terms of the first will. The respondents' claim cannot, in my opinion, be supported. The testatrix, during her lifetime, was a partner in the community which was dissolved by her death. For the purpose of realising and distributing her share of the joint estate, the applicants were appointed as executors, and they only refrained from performing this duty during the survivor's lifetime because the will directed that he should remain in possession of the joint estate. Upon his death they became bound to perform the duties undertaken by them when they accepted the trust, and in the execution of those duties they are entitled to an equal voice with the executors of the survivor in the same way as they would have had an equal voice with the survivor himself if the first will had not given him the right to remain in possession of the joint estate. That possession was given to him only during his lifetime, and upon his death the executors of the first dying became entitled to share such possession with the executor of the survivor. The assets of the partners in community have to be realised, and the executors of the one partner have as much right, in the absence of any provisions to the contrary in the joint will, to take part in such realisation as the executor of the other partner. This right exists quite independently of the power of transferring the legal ownership from the joint estate to the purchasers of the assets. Land which is registered in the name of the survivor can only be transferred by the executor of the survivor, but such executor has no greater rights of administration in respect of such land than the survivor himself had. The survivor, it is true, could transfer a legal title to a *bona-fide* purchaser, but as between himself and the executors of his deceased wife, he would have been bound to allow them an equal voice in the mode of realising the land. This view does not by any means conflict with the decision of the Court in *Visser's Executor v. Registrar of Deeds* (7 Juta, 98). In that case the testator and his second wife bequeathed a farm for a certain sum, which was to be paid into the estate of the survivor, and they appointed the survivor and two others as executors. The testator was the survivor, and married again, after which he died, having appointed his third wife as executrix. No question as to realisation arose, for the farm had been bequeathed on condition that the legatee paid a definite sum to the survivor's estate. The only person interested, therefore, was the executrix of the survivor, and as the land stood registered in his name, it was held

that his executrix was entitled to pass transfer to the legatee, notwithstanding an objection raised by the survivor's co-executors of his second wife's estate. The only other case cited in argument was *Brand's case* (4 Juta, 320). There an executor dative of the joint estate of Brand and his wife had been appointed after the death of both of them, at the instance of the executors of the survivor. The only object of such an appointment must have been to enable the executor dative to administer both estates, and it was held that, after themselves inducing the appointment, the executors of the survivor could not prevent the executor dative from administering the whole of the joint estate. In both cases it was taken for granted that a husband and wife might, by their joint will, use such language and deal with their common estate in such a manner as to prevent the survivor, after adiation, from appointing any other executor to administer any portion of the common estate than those appointed by such will. They might, for instance, appoint the survivor as executor of the first dying, and, after directing that he or she shall remain in possession of the whole of the common estate during his or her lifetime, nominate the executors by whom such common estate shall be administered on the death of the survivor for the benefit of the beneficiaries under the joint will. The will now in question does not so deal with the common estate. The first dying appoints executors to administer his or her estate upon the death of the survivor. The survivor, by his subsequent will, appoints an executor to administer his estate. After the death of the survivor, the common estate must be realised before it can be divided between the two estates, and distributed among the beneficiaries under the two wills, and the proper persons to effect such realisation are the executors of both partners. If, owing to the immovable property being registered in the name of one of the partners, his executor only can formally pass transfer, it does not follow that the executors of the other partner should have no voice in the realisation of such property. The applicants are, in my opinion, entitled to take part in the realisation and division of the joint estate, but, of course, each set of executors is entitled only to commission on half the proceeds of the joint estate. The respondent must pay the costs of this application.

The respondent was sued in his capacity of executor of the survivor's estate, so practically the costs will come out of the estate of the survivor.

[Applicants' Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

IN THE ESTATE OF THE LATE JACOBUS J.
GLAESER.

Mr. Graham applied for an order authorising the Registrar of Deeds to amend the deeds of transfer relating to certain lot of ground marked No. 5, Ward B, in the town of Worcester, the property of the said estate, by which it is made to appear that a half-share therein belongs to John Goodwin, whereas the whole thereof was sold by the executors in 1873.

The Court granted a rule *nisi* in terms of the Act, calling upon all persons concerned to show cause on the first day of next term why the transfer should not be granted as prayed.

THE PETITION OF JOHN HENRY GIBBS.

Mr. Webber applied for an order making absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act for transfer to petitioner of certain lot of land marked No. 2, in Block Q, situated behind the Castle, Cape Town, purchased by him from Lewis Wainwright, since deceased, but never transferred.

The order was granted.

THE PETITION OF ISABELLA SMITH.

Mr. Close applied for leave to the petitioner to sue by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion, and for the custody of the minor children of their marriage.

The order was granted, personal service of the citation to be effected, failing which the application to be renewed. Order returnable on the 12th January next.

PROVISIONAL ROLL.

BREDENKAMP V. DE VILLIERS.

Mr. Close applied for provisional sentence for the sum of £42 on a promissory note.

Granted.

FIELD V. UDWIN.

Mr. Stoney applied for final sequestration of the estate.

Decreed.

HIBERNIAN DISTILLERIES CO. V. { 1895.
CROWDER. { Nov. 1st.

Mr. Shell, for the plaintiffs, moved for a decree of civil imprisonment against the defendant in respect of an unsatisfied judgment of the Supreme Court for £33 15s. 4d. with interest, and costs amounting to £7 3s. 1d.

Execution had issued, and there had been a return of *nulla bona*.

The defendant appeared in person, and made an offer of £1 per month.

On being sworn, he said, in answer to the Chief Justice, that he was at present employed as an insurance agent, and earned from £12 to £15 a month. He rented a house, but the furniture was not his. It was hired on the hire-and-purchase system.

Cross-examined by Mr. Shell: My wife did formerly possess some cows, and carts and horses, but they were sold two years ago.

The Court granted the decree with costs, but suspended its operation subject to the defendant paying £3 per month; the first payment to be made to-day, and subsequent payments on the first of each month.

KEESE V. SIMES.

Mr. Molteno moved for the final adjudication of the respondent's estate.

Decreed.

HUGHES V. H. J. STENT.

Mr. Close applied for judgment for the sum of £34 18s. 7d., less £30 6s. 8d. paid on account.

Order granted.

REHABILITATIONS.

Ex parte FRANK GERALD PEEL.

Mr. Stoney moved for the rehabilitation of the insolvent.

Order granted.

Ex parte W. RODWELL.

Mr. Jones moved for the rehabilitation of the insolvent.

Order granted.

Ex parte JOHN PRIEST.

Mr. Castens moved for the rehabilitation of the insolvent.

The application was refused, with leave to apply again in six months.

Ex parte GREENWOOD WHITE.

Mr. Jones moved for the rehabilitation of the insolvent.

Granted.

Ex parte PHILIP RUDOLPH BOTHA, LSON.

Mr. Close moved for the rehabilitation of the insolvent.

Application ordered to stand over till the last day of term, pending the filing of a balance-sheet.

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE HENRY BOURHILL.

Mr. Tredgold moved for leave to the executor testamentary of the said estate to sue by edictal citation in an action for the recovery of the amount of two mortgage bonds, passed by the trustees of the Ark of Safety Lodge of Good Templars, under hypothecation of certain lot of ground in the village of Caledon.

The order was granted, personal service to be effected if possible; otherwise one advertisement in the "Natal Witness." Order returnable on the 12th December.

BAART V. BAART.

Mr. Graham moved for an extension of the return day of the citation issued by the plaintiff in an action against his wife for divorce, by reason of her alleged adultery, and for further directions as to the service of the process in the suit.

The Court granted extension of time till the 12th January, personal service to be effected at Middelburg (Holland) if possible; failing which citation to be advertised in the Middelburg newspaper.

THE ALIWAL NORTH BOARD OF EXECUTORS.

Mr. Molteno presented the third report of the official liquidator.

VAN REENEN V. VAN REENEN.

Mr. Juta, Q.C., applied for an order making absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to her husband of his conjugal rights.

The decree was granted.

IN THE ESTATE OF THE LATE JOACHIM LOURENTZ.

Mr. Graham moved for leave to the executrix testamentary to sell certain small lots of ground, the property of the estate, situated at Port Elizabeth, the buildings thereon being out of repair and the rental very small, it being for the benefit of the heirs that the same should be sold, and the mortgage thereon paid off.

Order granted.

IN THE ESTATE OF THE LATE JACOBUS J. GLAESER.

Mr. Graham applied for an order making absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act for transfer to the said estate of a half-share in certain erf 5 (marked A) in the town of Worcester, at present registered in the name of John Goodwin.

Order granted.

STACHAN'S EXECUTOR V. VRIES. { 1895.
Nov. 1st.
Derelict Lands Act, 1881—Farm—Transfer
—Griqua law.

Transfer of a farm ordered to be passed to the executor of the purchaser, who had acquired the farm twenty years prior to the date of the application, no objection during this period having been raised by the vendor's widow although she now opposed the application on the grounds, (1) that the full purchase price had not been paid, and (2) that by Griqua law her husband could not sell the farm without her consent.

Application to make absolute a rule *nisi* granted in Chambers by the Chief Justice on the 17th July last under the Derelict Lands Act 1881.

The petitioner was Mr. Donald Strachan, of Umzimkulu, in the district of Griqualand East, the executor testamentary of the estate of his late brother Thomas Strachan.

The petition set forth that one Arie Vries, *alias* Harry Vries, *alias* Harry de Vries, was the owner of a certain farm named Tiger Hoek No. 8C, situate in the district of Umzimkulu.

That a title to the farm had been issued by the Government to Vries and was now in the hands of the Chief Magistrate.

That Arie Vries sold the farm to Thomas Strachan on the 7th May, 1875, for the sum of £110, in proof of which the petitioner annexed a written declaration (annexure "B") signed by Vries on the 7th May, 1875, with the endorsements of payments made on it (annexure "C").

That the purchase price of the property was paid to Vries in the following manner:

£5 on the 7th May, 1875, receipt acknowledged in annexure "B."

£5 on the 24th May, 1875, receipt acknowledged in annexure "B."

£45 on the 2nd July, 1875, receipt acknowledged in annexure "B."

Vries also received on 2nd July, 1875, an approved bill for £30, which bill the petitioner alleged was duly met and paid on maturity.

That the balance of the purchase price then remaining (£25) was paid to Vries on 31st March 1877, according to receipt attached (annexure "D").

That Vries died in or about the year 1878.

That inquiries had been made at the office of the Chief Magistrate of Griqualand East, and it appeared that no will had been filed and no executor appointed to administer the estate of the late Arie Vries.

That the late Thomas Strachan sold the farm in question to one John Clark, jun., now deceased, on the 16th March, 1877, for the sum of £250, which was duly paid, and that the petitioner, in his capacity, had been called upon to give transfer of the farm to Clark's estate.

That it was arranged between the late Thomas Strachan and Clark that the cost of obtaining transfer of the farm from the name of Arie Vries to that of Strachan should be borne by Clark (a consent paper signed by Clark's executor dative agreeing that the costs of the present application, and of obtaining conveyance of the farm to the name of Thomas Strachan, should be borne by Clark's estate was attached).

The prayer was for:

1 An order authorising the Chief Magistrate of Griqualand East to deliver the title deeds of the farm to the petitioner.

2 An order authorising the Registrar of Deeds to cede and transfer the farm to the petitioner in terms of Act 28 of 1881.

3 An order for the cost of the application to be paid out of Clark's estate.

Mr. Buchanan now moved that the rule be made absolute.

The widow of Vries now opposed the rule being made absolute chiefly on the ground that the farm was sold without her knowledge or consent, and that by Griqualand law (at the date of the sale in force in Griqualand East) her husband had no right to sell the farm.

She alleged that by Griqua law Captain Kok gave the farms to husband and wife jointly, and that the husband had no right to sell the farm so given without the consent of the wife first having been obtained, and that should he sell without his wife's consent the half share of the property remained the property of the wife.*

She further alleged that no proof of full payment of the purchase price, as set forth

* Other Griqua witnesses deposed that this was a correct view of Griqua law, and stated further, that no community of goods existed between husband and wife, but that each retained his, or her own separate property, and was answerable for his or her own debts only.

REP.

in annexure "B," had been produced, as the promissory notes referred to in annexure "C" as having been received by Vries had not been filed of record. That the promissory notes were the proper receipts for the amounts of £30 and £25 respectively and ought to have been produced.

That the receipt marked "D" was not sufficient to prove the full payment of the purchase price and that she had every reason to believe that it was not what it purported to be—viz. a final receipt—as her husband shortly before his death told her that there was still a balance due on the purchase price, although he did not mention the amount.

Finally she said that if the Court found that the sale was in order then she claimed that only a half share of the farm should be transferred to Thomas Strachan on the balance of the purchase price, as represented by the promissory notes referred to in annexure "C," and not produced, being paid, the remaining half of the farm to be and remain the property of herself and children according to Griqua law and custom.

In answer to the above, Messrs. Donald Strachan (a gentleman who had lived in Griqualand East since 1862, and had been a Magistrate for many years under the Griqua Government) and Brisley (late Secretary to the Griqua Government, and a member of the Volksraad and Uitvoerende Raad) deposed *inter alia* that the view of Griqua law given by the widow Vries and her witnesses was not correct.

They alleged that under Adam Kok's régime farms were given to men for burgher services and that the grantees had full power to dispose of the same without the consent of their wives, who were not considered as joint owners of the farms, and had no interest in them.

Mr. Graham for the Widow Vries: It is submitted that the Derelict Lands Act was never intended to be applied to a case of this kind. The applicant's remedy is by action for a declaration of rights, when the question of the alleged payments and the other points involved can be gone into thoroughly.

The Court made the rule absolute with costs.

The Chief Justice said: If Arie Vries' wife, or any of his children were in possession of this property, I should certainly hesitate to make the present rule absolute, because these receipts, although they appear to be perfectly *bona fide*, do not entirely agree with each other, and in a case of this kind it lies upon the applicant clearly to prove that the money has been paid; but the strongest point in favour of the applicant is that Strachan and the purchaser from him—Clark—have been in pos-

session of this property for over twenty years and that no demand has been made upon them for the property, and that the widow and children of Arie Vries have been perfectly silent on the subject and have allowed Strachan and Clark to remain in possession. That is the strongest point in the applicant's favour, but in addition to that he puts in receipts and other documents to prove that the purchase price of the property has been paid by Strachan to Arie Vries. No doubt the dates somewhat differ as to the dates of payment, but this may be explained by the fact that one document is the receipt only, and the other the promissory note which had been given by Brisley, and it may well be that at the time the receipt was given he had not the promissory note in his possession, and that the receipt was subsequently endorsed on the promissory note; that may be the true explanation of the difference in the dates. But if the document is genuine, then it is clear that the money has been paid, and with regard to the payment of £25, it is stated to be the last instalment of the purchase price of this property. The only doubt I had was whether we should not give the Chief Magistrate at Kokstad the opportunity of showing that no proper title had passed from the Crown, on the ground that at the time it was given Arie Vries was dead. But that is not necessary, because the rule *nisi* was published in the "Government Gazette," and also in the "Kokstad Advertiser," and I think we may fairly assume that the notice came before the Chief Magistrate, and he has not come forward to show that the title was not properly passed to Arie Vries, and that the Crown had not parted with the possession of the property. Also I think it would be a pity that any further expense should be incurred with regard to this matter; for if any further inquiry was made, it would only tend to prove that the purchase money has been paid. The other question is as to the Griqua law, under which it is stated by the wife of Arie Vries that she is entitled to half the property; but this statement is refuted by Mr. Brisley, who was the Secretary to the Government for many years, and also by Mr. Donald Strachan, who has lived in the country for many years. But even if that was the law, the grant was made to Arie Vries alone, and the wife was not mentioned at all, either in this or in the documents relating to the sale by Arie Vries. The rule, therefore, must be made absolute, with costs.

[Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

RAUBENHEIMER V. PARSONS AND } 1895.
THE GEORGE LICENSING COURT. } Nov. 1st.

Liquor Licensing Acts—Local option—
Memorials—Reasonable time—Cancellation of licence.

A memorial approving of the issue of a new licence was signed, amongst others, by five voters, who placed their marks on the same, but the person attesting the marks was not a registered elector for the Divisional Council.

Held that, for the purpose of ascertaining whether the memorial was duly signed by a majority of voters within the ward, in terms of the 13th section of Act 25 of 1891, the names of the five voters must be excluded.

A memorial objecting to the issue of a new licence must be lodged with the Resident Magistrate at a reasonable time before the meeting of the Licensing Court so as to give the applicant for the licence an opportunity of meeting the objections, but the provision as to the lodging of memorials four days before the meeting of the Court does not apply to such a memorial.

A memorial objecting to the issue of a new licence to the respondent was lodged by the applicant within the four days by about an hour, but the person who collected the signatures did not append a certificate in terms of the 24th section of the Act 28 of 1883 until the morning the Court sat.

Held that, in the absence of any proof of prejudice to the respondent, the Court was not justified in rejecting the memorial on the ground either that it was not lodged in time or that the certificate was improperly appended.

Upon the memorial objecting to the licence appeared the names of several persons who had signed the memorial approving of the licence.

Held that, the names must be excluded from both memorials.

After excluding those names as well as the names of those whose marks had not been properly certified there was not a majority in favour of the licence.

Held, that the Licensing Court was not justified in issuing a new licence, and, ordered that the same be cancelled.

This was an application on notice to the respondents, that they would be required to show cause why the proceedings of the Licensing Court for the division of George, held at George on the 4th September, 1895, should not be set aside on the grounds:

(a) That the memorial objecting to the issue of a licence to Parsons was improperly rejected by the said Court.

(b) That certain signatures by means of marks or crosses appearing on the memorial approving of the issue of a licence to the said Parsons were improperly attested, and should have been struck off from the said memorial.

(c) That three of the members of the said Court were disqualified from sitting as members of the said Court, inasmuch as they are members of the Divisional Council of George, which Council is the owner or landlord of the premises, in respect of which the licence was applied for by the said Parsons.

Why the licence for the sale of wine and spirits by retail granted to the first-named respondent by the said Court should not be cancelled by reason of the said Parsons not having complied with the provisions of section 13, sub-sections 1 and 6 of Act 25 of 1891, in that the memorial lodged by him with the Resident Magistrate for the division of George, in terms of the said sub-section 1, was not at the sitting of the said Court signed by a majority of voters registered for the election of members of the Divisional Council of George within the limits of District No. 4, or Klip and Doorn River, as required by the said sub-section 1. And to show cause why they should not be ordered to pay the costs of the application.

The facts are as follows:

The applicants are both registered voters for the Divisional Council of George, the first in District No. 4 and the second in District No. 5, in the neighbourhood of the North Station.

At the sitting of the Licensing Court on 4th September last the respondent Parsons applied for a new retail wine and spirit licence with full privileges entitling him to sell liquor at the North Station within the Divisional Council District No. 4 and in support of such application a memorial was filed with the Court.

The memorial had subscribed to it the names of thirty-five persons and purported to have been signed by them as registered voters of District No. 4.

Of the thirty-five who signed the memorial five signed by placing their cross or mark upon the memorial and the mark was witnessed in each case by one D. Truter, who was not a registered voter for the Divisional Council.

Two other memorials signed by twenty-one persons, including the first-named applicant, objecting to the granting of the licence to Parsons, were also lodged with the Licensing Court, eleven out of the twenty-one persons who signed it being registered as voters for the election of members of the Divisional Council of George in respect of property situate within the limits of District No. 4.

The names of six of these voters appeared on both the memorials (for and against the licence).

The numbers of voters registered in District No. 4 is fifty-six, the majority required being therefore twenty-nine.

One name, that of Hendrik Welsh, appearing on the memorial in favour of the licence, did not appear on the voters' roll as a voter for District No. 4.

The applicants alleged that if from the memorial in favour of the licence Welsh's name were removed and the names of those using a cross or mark, and the names of those whose signatures appeared on the memorial in favour of and against the licence, making in all twelve, the memorial in support of the application would only have twenty-three signatures.

At the sitting of the Licensing Court the Chairman ruled that the counter-memorial could not be accepted, as it did not fulfil the requirements of the Act, and the Court granted the licence to Parsons.

The applicants further alleged that the Court consisted amongst others of three members of the Divisional Council, and the premises, in respect of which the licence was granted, are the property of the Divisional Council of George.

The first-named applicant specially alleged that he signed the counter-memorial objecting to the issue of the licence to Parsons on the ground that he was inconvenienced by there being licensed premises at the North Station, inasmuch as they were a constant source of temptation to his farm labourers and servants passing on their way to and from George with his waggon and property.

The second-named applicant opposed the granting of the licence on somewhat similar grounds.

The Chairman of the Licensing Court, the Resident Magistrate of George, alleged, *inter alia*, that the memorials against the licence were *ab initio* rejected by him as invalid on the following grounds:

(a) That they were handed in late.

(b) That both the memorials were without the declaration signed by the person by whom

the signatures were collected, as required by the 3rd paragraph of the 24th section of Act 28 of 1883.

(c) That together the memorials did not contain a majority of the names of the voters registered for the election of members of Parliament within the limits of the field-cornetcy within which the licensed premises are situated required by section 27 of Act No. 28 of 1883, there being only seventeen voters' names on the memorials, whilst a majority required no fewer than forty-seven names.

That the fact that the memorials were so rejected by him, and the grounds, as stated, on which they had been rejected, were duly brought to the notice of the George Licensing Court.

That the name Hendrik Welsh appearing on the memorial in favour of the licence corresponded with the name Hendrik Wells appearing on the voters' list and was so dealt with and had been so dealt with on former occasions.

That the memorial in favour of granting the licence was signed by a majority of the voters registered for the election of members of the Divisional Council of George within the limits of the field-cornetcy in which the licensed premises are situated, and that if the names of the five persons whose marks were improperly attested by Truter were struck off, the memorial would still be signed by a majority of registered voters as required by section 13 of Act No. 25 of 1891.

In answer to the Magistrate's affidavit, the second-named applicant alleged *inter alia*:

(a) That the memorials opposing the issue of the licence were handed in to the Resident Magistrate at ten o'clock on the 31st August, 1895, or four days before the sitting of the Licensing Court.

(b) That the declaration at the foot of one of the memorials against the licence was written by him and would have been signed at the same time, but he was under the impression that he had duly completed the declaration by writing it in his own handwriting. That subsequently on the 4th September, 1895, he saw the Resident Magistrate and Chairman of the Licensing Court when at his (deponent's) request, the Resident Magistrate allowed him to sign the declaration and attested his signature. That the declaration was duly completed before the sitting of the Court, and no exception was taken at any time either by the Chairman or by the Court to the manner in which the declaration had been made.

Mr. Rose-Innes, Q.C., in support of the application: The application was admittedly one for a new licence, therefore by section 13, sub-

section 1 of Act 25 of 1891, the Court had no power to grant it unless supported by a majority of Divisional Council voters in District No. 4.

The main facts are not disputed, the memorial was signed by thirty-five voters, but five of these had made crosses which had to be witnessed by a Divisional Council elector (sub-section 6). It is admitted that they were not so witnessed, therefore the effective number was reduced to thirty, or to twenty-nine if the name of Welsh is struck off.

Further one of the applicants lodged with the Magistrate, at ten o'clock on 31st August, two petitions signed by three and eighteen persons respectively against the granting of the licence. On the larger of these petitions appeared six names which had also appeared on Parsons's petition, consequently by sub-section 3 the six names should have been struck out of both petitions, and if that had been done there would only have been twenty-three or twenty-four names on the memorial in favour of the licence, and not the majority as required by sub-section 1.

But the memorial of eighteen was rejected though laid on the table, and the point is whether it was rightly rejected.

In considering this point regard must be had to the law as it stood before the passing of the Act of 1891. See sections 23, 26 of Act 28 of 1883.

Section 23 provided for memorials by Parliamentary electors objecting to an increase in the total number of licences.

Section 24 provided for the form and the declaration to be attached. Then came the Act of 1891 that dealt with particular licences, and refers not to Parliamentary voters but to Divisional Council voters.

The first reason given by the Resident Magistrate for rejecting the memorial was that it was lodged too late, but no time is laid down in the Act within which non-statutory memorials against a new licence need be lodged. All persons have the privilege of petitioning the Court. Rules are laid down as to petitions in favour of a new licence and against the renewal of an old licence, but other petitions can be sent in at any time. There is no allegation here that any prejudice was sustained on account of the late lodging of the petition against the licence. It was lodged at ten o'clock on 31st August and the Court sat at ten o'clock on 4th September, that is four days, see Act 5 of 1883, section 6.

As to the second ground of rejection, the declaration was allowed to be declared to on the 4th September before the Court, and this having been allowed it could not be rejected;

the provisions of the Act only apply to certain petitions named in it; there is nothing in the Act which required the declaration to the petition in question.

The third ground of rejection was the real one, and on it the Resident Magistrate clearly erred by overlooking the Act of 1891, as Parliamentary electors had nothing to do with the case. Again, three members of the Court were landlords of the premises proposed to be licensed, and under section 29 of Act 28 of 1883 they could take no part in the discussion on the application.

On every ground it is submitted that the proceedings of the Licensing Court should be set aside and the licence cancelled.

Mr. Searle, Q.C., for the respondents: It is very doubtful if the Licensing Court can take notice of any memorials which are not statutory memorials.

If the memorials against the licence could be entertained it is submitted that they were properly rejected, as the declaration was not signed as required by Act 28 of 1883, section 24, sub-section 8, and this was a defect which could not be cured by the Licensing Court.

The objection to three of the members of the Court that they were landlords of the premises is absurd. The property is owned by the Government and is merely vested in the Divisional Council for the time being, but no individual member of the Council could grant a lease of the premises or exercise any of the ordinary rights of a landlord.

The application was granted.

De Villiers, C.J.: This is the first case in which the so-called local option clauses of the Liquor Act of 1891 have come under the consideration of the Court, and the questions raised are of some importance. I may say at once that I dismiss from this case altogether the question raised by Mr. Searle as to the utility of this particular licensed place. I am afraid that the feeling that it is required in that particular neighbourhood had considerable weight with the Licensing Court, and that in having that strong opinion as to the necessity of that particular place, the Licensing Court somewhat lost sight of the stringent provisions of the Act under which they were acting. The 1st sub-section of the 13th section of the Act of 1891 provides, in effect, that no new licences shall be granted "unless there shall be lodged with the magistrate of the district, at least four days before the Licensing Court sits to consider the application, a memorial or memorials signed by a majority of the voters registered for the election of the members of the Divisional Council within the limits of the Divisional

Council district in the district in which the premises proposed to be licensed are situated, approving of the issue of the said licence." Then the 6th sub-section provides that any memorial lodged for the consideration of any Licensing Court may in case of voters unable to write, be signed by such voters placing their cross or mark on the same, but no such cross or mark shall be of any effect unless duly attested by the signature of at least one witness who is a registered elector for the Divisional Council. The first substantial objection raised against the memorial presented on behalf of the respondent's licence, was that there were five marks of registered electors which were not duly attested by the signature of a registered elector for the Divisional Council. It is admitted on behalf of the respondent, that Mr. Truter, who witnessed the signatures on behalf of these five persons, is not a registered voter, and that is a fatal defect; it was impossible for him to attest the signatures of these five persons, and therefore the names of these five persons ought clearly to be struck off the list, in addition to the two the Magistrate had already struck off. Then remains the question as to those electors who had signed two different memorials, one in favour of and the other against the licence. The 3rd sub-section of the 13th section provides that in the case of the same persons affixing their signatures both to a memorial for the licence and to one against the licence, those signatures shall be of no effect and shall be considered as if struck out of both memorials. Now it is admitted that the names of several persons appear on both memorials, and that if those names be struck out from the memorial in favour of the licence then there would not be the requisite majority. Therefore it became important for the respondent to show that the so-called memorial against the licence was really no memorial at all in terms of the 3rd sub-section of the 13th section. The reason stated for its being no memorial is that it was not lodged within four days. In my opinion it was not necessary to lodge it within four days. The provision in regard to memorials in favour of a new licence does not apply to a memorial objecting to the issue of licences, and there is nothing either in the Act of 1891 or in those provisions of the Act of 1883, which were incorporated with the Act of 1891, requiring the four days in respect of a memorial objecting to the issue of licences, but in my opinion such a memorial must be presented within a reasonable time. The ques-

tion whether it is a reasonable time or not must depend on all the circumstances of the case, and of this the Licensing Court will be the best judge. If the applicant for a licence would be prejudiced by a memorial objecting to his licence being sprung on him, the Licensing Court would be quite justified in rejecting it. But that was not the ground they took in the present case, but they rejected the memorial on the purely technical ground that four days had not elapsed. Now that was not a good ground for rejecting it. They ought to have considered whether this memorial objecting to the licence had been presented within a reasonable time. I will not go into the question whether it was presented within the four days or not, but in my opinion it was presented within a reasonable time. Supposing the meeting of the Court took place at nine o'clock in the morning, it might be argued that it was not four days, but, at any rate, it was a reasonable time. But then came the further technical question that the memorial objecting to the licence was not certified in the manner required by the 24th section of the Act of 1883. I quite agree with Mr. Searle that the 24th section having been incorporated into the Act of 1891, should apply here; and the 3rd sub-section of the 24th section provides that: Annexed or appended to such memorial there should be a declaration signed by the person by whom the signatures were collected in the form as nearly as is material marked B in the 3rd schedule. At the time this memorial was presented there was no such declaration attached to the memorial, but before the memorial was considered by the Licensing Court this purely technical effect had been cured. It is admitted that Raubenheimer, who collected the signatures, was a qualified elector, and it was a purely technical defect that he had omitted to write his certificate below the signature. In my opinion this defect in the memorial could be cured before the Licensing Court met, and that Court could not reject the memorial objecting to the licence on this technical ground. Therefore, I consider that the memorial was in proper form before the Licensing Court. Then, being in proper form, we find that several of those electors who had signed in favour of the licence had turned round and signed against it. In my opinion the 3rd sub-section of the 13th section would apply here, and the names of those who signed against the licence for which they had previously signed in favour ought to be struck out. For these reasons I am of opinion that the Licensing Court was wrong, and that their proceedings ought to be set aside and the licence cancelled.

The only difficulty is in regard to costs, but as Mr. Parsons has come forward and defended the action of the Licensing Court, I think that at any rate the costs of opposition should be paid by the respondent Parsons.

Mr. Justice Upington: I am of the same opinion, although I must say that I think the legislation on the subject is a little defective. It seems to me a hardship not to fix some definite period within which memorials must be presented against the granting of a licence.

[Applicants' Attorney, C. C. de Villiers; Respondents' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

IN THE ESTATE OF THE LATE JACOBUS J. FERREIRA.

Mr. Molteno applied for an order authorising the Registrar of Deeds to amend certain deed of transfer of a piece of perpetual quitrent land, situate in the district of Uitenhage, the property of the estate, by erasing therefrom the words "one half part or share in," which were erroneously inserted when the deed was passed on the 6th August 1844.

The order was granted.

IN THE MATTER OF THE MINORS BREWIS.

Mr. Tredgold moved for authority to the Master of the Supreme Court to pay out to the mother of the said minors certain amount standing to their credit in the Guardians' Fund, to enable her to purchase a small cottage as a home for herself and family, she being a widow and quite destitute.

Order granted.

THE GRAND HOTEL COMPANY.

Mr. Jones presented the report of the liquidator.

The Court made the usual order that the report should be open for inspection at the office of the liquidator, and that one advertisement of the fact should appear in a Cape Town morning paper.

IN THE INSOLVENT ESTATE OF JACOBUS H. G. VERMAAK.

Mr. Watermeyer moved for authority to the Master of the Supreme Court to call a meeting of creditors of the said insolvent estate for the purpose of electing a trustee thereof in the place of the late Henry N. Chase, further assets having accrued to the estate,

Order granted.

STARCK V. STARCK.

Mr. Sheil moved that the return day in this case might be extended until 20th November.

The Court granted the application.

WANNENBURG V. LE ROUX } 1895.
AND OTHERS. } Nov. 4th.

Will—Construction—Usufruct—Substitution
—Children.

Husband and wife, by their mutual will, appointed the survivor and the children of the marriage as their heirs and, in case of predecease of one or more heirs, such predeceased's legitimate descendants "and that of all goods to be relinquished, both movable and immovable."

The testators then proceed to specify the particular farm which each child should take, subject to a life usufruct in favour of the surviving testator, and inter alia, assign a certain farm "to our daughter D. and the children born of her marriage with W."

Held, that on the death of the first dying D. became entitled to the farm subject to the usufruct in favour of the survivor, and that the children were only intended to be substituted in case of D. predeceasing the first dying testator.

Human v. Human's Executors (10 Juta, 172 ; 3 Sheil, 160) followed.

This was a special case, stated for the opinion of the Court in the following terms :

1. The plaintiff is Abraham Johannes Wannenburg, A.J.son, resident in the district of Oudtshoorn ; the defendants are (1) Josephus Johannes Hendrik le Roux, the grandfather of the plaintiff, who is sued individually and also his capacity as executor testamentary of his deceased wife, Margaretha Louisa Isabella le Roux (born Wolmarans). (2) Josephus Johannes Hendrik Wannenburg, who is a brother of the plaintiff and a major. (3) The following brothers and sisters of the plaintiff: (a) Margaretha Jacoba, (b) Pieter Johannes Daniel, (c) Jan Barend, (d) Judith Johanna, (e) Andries Stephanus, (f) Frederick Philippus, (g) Johannes Daniel, who are represented in this action by their *curator ad litem*, Henry Hubert Juta, who was appointed as such by an order of this Honourable Court bearing date March 7, 1893.

2. On or about the 19th of December, 1887, the first-named defendant and his wife aforesaid, to whom he was married in community of

property, executed their last mutual will, a copy of which is hereunto annexed marked A, in terms of which they made *inter alia* the following bequest, subject to a life usufruct in favour of the survivor of them "and to their daughter Margaretha Louisa Dorothea and the children born of her marriage with Abraham Johannes Wannenburg, all the lands from the upper drift to the second beacon between the two lands on the right side of the road." The lands thus referred to were and are portion of a farm in the district of Oudtshoorn.

3. The plaintiff and the second and third named defendants are children of the said Margaretha Louisa Dorothea Wannenburg (born Le Roux), who at the date of the said will was married in community of property to Abraham Johannes Wannenburg, the father of the plaintiff.

4. In or about the 24th January, 1882, the said Margaretha Louisa Isabella le Roux died, leaving the said will of full force and effect. The first-named defendant was duly appointed the executor of her estate, and he thereafter adiated and accepted benefits under the said mutual will, and remained in possession of the property specially bequeathed as aforesaid by reason of the life usufruct given to him by the said will.

5. The estate of Abraham Johannes Wannenburg, the plaintiff's father, was sequestrated as insolvent on or about the 16th of December, 1890.

6. On or about the 7th of February, 1891, one John Cairncross, the trustee of the insolvent estate of the said Abraham Johannes Wannenburg, duly sold to the plaintiff, who purchased from him, all the rights of the said insolvent and his wife to the land referred to in section 2 of this case.

7. The testator (the first-named defendant), the said insolvent, and his wife are still living. The plaintiff contends that he is entitled, subject to the life usufruct of the testator (the first defendant), to the full and entire ownership in the land referred to in section 2 of this case by virtue of his purchase, or in the alternative, that he is entitled to a half-share of the said land as purchaser aforesaid, the children of the said Margaretha Louisa Dorothea being jointly entitled to the other half.

The defendant, the *curator ad litem*, contends that the plaintiff by virtue of his purchase and the children of the said Margaretha Louisa Dorothea Wannenburg are each entitled to an equal share of the said land, and that the date of distribution and for ascertaining into how many shares the said land is to be divided is the death of the testator, the first-named defendant.

Each party prays for judgment in accordance with its respective contention.

Mr. Rose-Innes, Q.C., for the plaintiff: Under the will the survivor is heir of the first-dying, but in case of the death of one or more heirs then the representatives of the deceased heir are substituted. It is clear therefore that each testator contemplated more heirs than one. Now who could be the heirs? Only the children of the testators. The usual form of a will is that the survivor and the children of the marriage are appointed heirs and that was what the testators intended in the present will. The clause of the will *re* ascertaining the portions of the heirs proves this. See *Oosthuyzen v. Mocke* (1 Ros., 330). If that is so then all the children are heirs, and the grandchildren are substituted for predeceasing parents. Apart from the special bequest "to our daughter and the children, &c," the law would assume that children were not meant to share equally with their parents. See *Human v. Human's Executors* (3 Sheil, 160).

That case is directly in point.

If children take they only take a half *per stirpes*.

If our argument is correct then the plaintiff's rights are clear. The testatrix died and the testator adiated therefore the plaintiff's mother acquired a vested right subject to her father's life usufruct. The plaintiff's father became insolvent in 1890 and the plaintiff bought all his father's and mother's rights, therefore he is now entitled subject to his grandfather's life usufruct.

Mr. Juta, Q.C., for the defendants.

De Villiers, C.J.: The terms of the will for the appointment of heirs are certainly obscure, but counsel on both sides are agreed that the children of the marriage were intended to be appointed together with the surviving testator as heirs of the first dying. The will adds that in case of the predecease of one or more of our heirs, such predeceased's legitimate descendants *per stirpes* are appointed, "and that of all goods to be relinquished by the first dying both movable and immovable." Clearly the testators' intention was that the children should inherit the immovable property and that further descendants should only be substituted in case of the predecease of any of the testator's children. The testators then proceed to specify the particular farm which each child should inherit, subject to the condition that the survivor shall, till his or her death, remain in full and undisturbed possession of all the landed property belonging to the joint estate. The farm now in question is assigned "to our daughter Dorothea and the children born of

her marriage with Wannenburg." The question to be determined is whether it was intended to bequeath the farm to Dorothea and her children simultaneously, or whether the children were intended only to be substituted for Dorothea in case of her dying before the vesting of the legacy. Reading the terms of the bequest by the light of the rest of the will I am of opinion that the latter construction is the correct one. Having already provided that the descendants of the heirs should be substituted for any of the heirs who should predecease the first dying testator, the testators, when they came to deal specifically with each farm, deemed it sufficient to assign it to such and such a child and his or her children. But if the will itself left the matter in doubt the rule of construction adopted in *Human v. Human's Executors* (10 Juta, 172) would lead to the same conclusion. There might have been some difficulty in the present case in deciding whether Dorothea took a vested interest upon the death of the first dying testator, but this difficulty is obviated by the admission that the surviving testator had only a life usufruct in the farm. If this admission be correct—and we must assume that it is—it is not necessary to wait until the death of the survivor in order to ascertain whether Dorothea is to take the farm to the exclusion of her children. The plaintiff who has purchased all Dorothea's rights from the trustee of her husband's insolvent estate is entitled to succeed in this action, and judgment must be given in terms of the plaintiff's contention.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Birset; Defendant's Attorney, C. C. de Villiers.]

REGINA V. BREDENKAMP. { 1895.
Nov. 4th.

Liquor licence—Act 28 of 1883, section 75—
Credibility of witnesses.

Where in a prosecution for contravening the Liquor Licensing Act of 1883 the Magistrate believed the evidence for the prosecution and convicted, the Court, on appeal, declined to interfere with the sentence passed by the Magistrate.

This was an appeal from a decision of the Resident Magistrate of Caledon. The accused was charged with contravening section 75 of Act 28 of 1883, in that he did, on or about the 1st day of September, 1895, at or near the Oaks, wrongfully and unlawfully sell, and dispose of one bottle of brandy to one Petrus Andries, for one shilling, without having the necessary licence required by law.

The accused excepted to the summons on the grounds that it did not set forth the place of residence of the accused, neither did it show where the Oaks at which the alleged sale took place is situated.

The exception was overruled.

Petrus Andries, who had formerly been in the service of the accused as a shepherd, was the chief witness for the Crown. He deposed that on Sunday, 1st September, he was at the Oaks. That he went into the cellar of the accused and asked him for a liquor (a dop of wine) which he got. He then asked the accused for a bottle of brandy, he having brought a bottle with him; he then got the bottle of brandy and paid the accused 1s. for it.

On the following morning Andries was found by his master under the influence of liquor.

In cross-examination the witness stated that a Mr. Vigne and a Mr. Groenewald who were present at the door of the cellar must have known everything that occurred. These two witnesses were called for the prosecution but they denied that they had seen any money pass.

When Andries was found drunk by his master he first said that he had got the brandy through the post; when pressed as to whether the accused had given it to him he did not reply, but he subsequently admitted to his master that he had bought it from the accused.

The accused denied that he had sold the brandy, but admitted that he had given Andries about half a bottle of liquor (presumably) because he was about to return to his service.

The Magistrate found the accused guilty and imposed a fine of £5.

The following were his reasons: As the case rested upon the credibility of the evidence I was perfectly convinced that the evidence of Petrus Andries was the most reliable, and that he purchased the bottle of brandy from the accused for 1s., as no farmer is likely, as the accused alleges, to give a boy a glass of wine and then a bottle of brandy gratis simply because he was at one time a shepherd in his employ.

Petrus Andries admits that he got the glass of wine gratis, as the servants of the accused happened to be in the cellar at the time to get their afternoon liquor.

The accused has been suspected for a long time of selling liquor to his neighbours' servants, and he is not likely to take a witness to the transaction of his selling the brandy to Petrus Andries.

The accused now appealed.

Mr. Innes, Q.C., for the appellant.

Mr. Giddy for the Crown.

The appeal was dismissed.

The Chief Justice said: The case rests entirely on the credibility of the witnesses, and although there was only one witness for the prosecution and several for the defence, still if the Magistrate honestly believed the witness for the prosecution he was bound to convict the defendant. Now, I think the chief evidence in this case is that of Piet Andries and of Bredenkamp, because as to the other witnesses, they could not have seen the money pass, but the money might have passed to Bredenkamp without their seeing it. So really it is a question of credibility between the two witnesses, Piet Andries and Bredenkamp. Now, there was no reason why Andries should say he bought the brandy rather than that it was a present, and he swears positively he paid 1s. Then, on the other hand, Bredenkamp's statement that he gave only half a bottle of brandy seems to me so improbable, considering the effect it had on Andries; for on the following day he was drunk; his master's sheep were all scattered about, and the man was drunk, and incapable of looking after them. Then it does seem strange that a man like the defendant, if he were not guilty, should take such a paltry exception to the summons. He excepted because the summons did not set forth the residence of the accused, nor state where the Oaks was situated. Now, an innocent man would not have taken such a paltry exception. Mr. Innes laid much stress on the Magistrate's remark that the accused was for a long time suspected; but that is only a remark he makes now to the Court in giving his reasons, and was not made at the time he gave judgment. I think, however, it would have been better if he had not made the remark, and it is to be hoped that he had no such thought in his mind when he convicted. But the Magistrate states that he rested his judgment on the credibility of the witnesses for the Crown, and there is nobody who is better able to judge of credibility than the Magistrate who saw the witnesses and heard the evidence. The appeal must be dismissed.

[Appellant's Attorney, Paul de Villiers.]

VAN HEERDEN V. JONAS. } 1895.
 } Nov. 4th.
 Poulds Act, 1892, section 29—"Stray animals."

Where a master had allowed his servant's cattle to remain on his farm after the servant had left his employment and subsequently impounded the cattle,

Held, that the master could not be convicted of a contravention of section 29 of Act 15 of 1892, as the cattle were not "stray animals" within the meaning of that section.

This was an appeal from the conviction of the appellant by the Resident Magistrate of Murraysburg.

The appellant was charged with the crime of contravening section 29 of Act 15 of 1892, in that upon or about the month of October, 1894, and at or near Bloemfontein, in the district of Murraysburg, the said Van Heerden did (1) wrongfully, unlawfully, and knowingly allow certain eleven head of stray cattle, the property of Geswint Jonas, to remain upon his property for a longer period than two weeks without having forwarded to the said Jonas, or to the nearest poundmaster, the notice required by law of the presence of such cattle upon his said farm, Bloemfontein; and (2) did thereafter in the month of August, 1895, contravene section 72 of the said Act by wrongfully and unlawfully sending the said cattle to the pound, whereby the said Jonas suffered damage in the sum of £31 8s. 1d.

The accused pleaded not guilty to the first count of the summons.

He excepted to the second count on the grounds that the complainant's claim being for damages he should have proceeded by civil action. This exception was allowed.—On the first count the Magistrate found the defendant guilty, and imposed a fine of £1, and also ordered the defendant to pay the damages claimed, £31 8s. 1d.

The defendant now appealed.

The facts are as follows: In May, 1883, the complainant entered the defendant's service and left it in October, 1894. When Jonas was leaving the defendant's service Van Heerden allowed the complainant's cattle, which he had earned whilst in his service, to remain on the farm, but no arrangement was made as to how long they were to remain.

Jonas returned in September, 1895, and found that Van Heerden had sent his cattle to the pound. Instead of releasing them and suing for damages, he sued Van Heerden under the 14th section of the Masters and Servants Act of 1873 for damages for wages wrongfully withheld. The case was decided in Van Heerden's favour by the Magistrate and no appeal was brought from his judgment. In the meantime the cattle were sold by the poundmaster. Jonas then commenced the present proceedings.

Mr. Rose-Innes, Q.C., in support of the appeal: The second count of the summons having been disallowed, the first only remained for consideration. The object of the section is clearly to prevent persons from detaining neighbours' cattle on fenced farms. The section does not apply to a case like the present. The cattle

were not stray cattle; they were left on the farm by the owner himself, therefore the first count should have been dismissed.

As to the second count the Magistrate sustained the exception taken to it and could not afterwards award damages under it, even if there had been proof of damage, which there was not.

The case is a hard one on Jonas, but he was badly advised.

His remedy, if he had any, was by civil action for damages for unlawfully impounding the cattle.

Mr. Giddy for the respondent.

The appeal was allowed, but no order was made as to costs.

The Chief Justice said: This unfortunate man Jonas has been badly advised throughout this matter. The prosecution has now taken place under the 29th section of the Pounds Act, which does not apply at all. That section was introduced for the purpose of preventing the illegal detention of animals found trespassing, and it enacts that no proprietor shall knowingly allow any stray animal to remain upon his property for a longer period than two weeks, unless he shall have forwarded notice to the owner, if known to him, or to the nearest poundmaster. Now this is not a case of stray animals at all; they were animals on Van Heerden's property by arrangement that he should keep them for this man Jonas, animals which had been given to Jonas as wages for work done. I put the question to Mr. Giddy, "When did these animals become stray animals?" and the answer was, "When they were taken to the pound." Well, if they were taken to the pound, then Van Heerden did not knowingly allow them to remain on his property. There was no contravention of the section and therefore the fine was improperly imposed, and also, unfortunately, the £31 was improperly awarded. I feel some sympathy for this unfortunate man Jonas, who ought to have brought a civil action under the 72nd section for illegal impounding the animals. If he had any action at all, that was what he should have done. Instead of that he proceeds criminally against Van Heerden for withholding wages, and when the Magistrate finds that the cattle were given as wages, he wrongly proceeds under the 29th section. There is no option but to reverse the judgment of the Court below, but no order will be made as to costs.

[Appellant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

REGINA V. DAVIS AND OTHERS. { 1895.
Nov. 4th.

Repealed Proclamation—Conviction.

Conviction under repealed Proclamation quashed

This was an appeal from the conviction of the appellants by the Resident Magistrate of Simon's Town.

The accused were charged with the crime of contravening the extended provisions passed under Act 15 of 1893, in that upon or about the 26th September, 1895, and at or near False Bay, in the district of Simon's Town, the said Davis and others did wrongfully and unlawfully capture and kill certain sea birds, to wit, bastians and malmock, within the foreshores of the mainland or territorial waters of the Cape Colony.

The accused pleaded not guilty.

The evidence for the defence went to show that the birds were not caught intentionally, that the birds, which they were accused of killing, are in the habit of diving after the hooks and bait, and that they cannot be taken off the hooks without being killed.

The accused were found guilty, and sentenced to pay each a fine of 5s, or in default to be imprisoned and kept at hard labour for three days.

From this sentence the present appeal was brought.

Mr. Graham for the appellants.

Mr. Giddy for the Crown informed the Court that he was not prepared to support the Magistrate's judgment, as the accused had been convicted under the repealed Proclamation No. 8 of the 8th January, 1895, the latter Proclamation having been repealed by Proclamation 220 of 29th May, 1895.

The appeal was allowed.

The Chief Justice said: It is quite clear that this appeal must be allowed. The appellants were prosecuted under a proclamation which has ceased to exist. The Proclamation of the 8th January, 1895, was cancelled by the subsequent Proclamation of the 29th May, 1895, and in the schedule to that Proclamation only three sea-birds are protected in the manner in which all the other sea-birds were protected by the previous Proclamation, these being penguins, molchas, and sea duikers. The birds which the appellants are charged with killing are the bastian and malmock. There is nothing to show that these fall within the category of birds mentioned in the schedule, but even if the birds caught had been protected birds, I am by no means sure

that the decision was a right one. According to the evidence, these fishermen were fishing in a *bona-fide* manner. There is no evidence whatever that they were attempting to catch birds, but, unfortunately, birds came and settled on the hooks. What were the poor fishermen to do? Had they released the birds, they probably would have died of their injuries, and if they had thrown them back into the water nobody would have been the wiser. Instead of that, having possession of the birds, they took them home and used them for food. There is no evidence that they were out for the purpose of killing birds and not fish. Even on the merits of the case, therefore, I think there was no case for the prosecution.

[Appellant's Attorney, D. Tennant, jun.]

LE ROES V. GOLDIE. { 1895.
Nov. 4th.

Magistrate's Court—Jurisdiction—Eviction—Ejectment—Lease—*Bona-fide* defence.

The lessee of a windmill sued the lessor in a Magistrate's Court for specific performance and for £10 as damages for wrongful eviction and the defendant took exception to the jurisdiction, but judgment was given for the plaintiff on both counts.

Held, on appeal, that the Magistrate had no jurisdiction to decree specific performance on the first count, and that, as the plaintiff did not offer to amend the summons in the Court below by striking out the first count, the whole summons was beyond his jurisdiction.

Held, further, that the 10th section of Act 20 of 1856 does not confer jurisdiction on magistrates in actions for ejectment against a lessor at the suit of the lessee.

This was an appeal from a decision of the Resident Magistrate of Bredasdorp in an action in which the present respondent, plaintiff in the Court below, sued the appellant, defendant, for breach of contract.

The summons alleged that on 8th July, 1895, the defendant hired and leased to the plaintiff a certain mill and premises, the property of the defendant, situate near the village of Bredasdorp, for a period of one year, commencing from 10th July, 1895, at the rent or hire of £25, and, upon certain other conditions and stipulations.

That after the defendant had given possession to the plaintiff, the defendant did on 24th July, 1895, wrongfully and forcibly and against

the will of the plaintiff re-enter into possession of the mill, and now refuses to fulfil the agreement or lease entered into between the plaintiff and the defendant by giving free and undisturbed possession of the mill to the plaintiff, although the plaintiff is willing and offers to fulfil all the conditions and stipulations incumbent on him under the agreement or lease, whereby the plaintiff has suffered damage to the amount of £10.

The plaintiff further alleged that he had repeatedly demanded and requested the defendant to restore to him the peaceable occupation and possession of the said mill, but that the defendant refused to do so.

The plaintiff prayed (1) that the defendant might be adjudged to deliver up possession of the said mill to the plaintiff; (2) that the defendant might be adjudged to pay the plaintiff the aforesaid amount of damages, with costs of suit.

The defendant excepted to the summons on the ground that the Court had no jurisdiction, as the action was for delivery and damages, and involved future rights. *Wienand v. Goldschmidt*, 5 E.D.C. 257; *Westfall v. Bartlett*, 1, E.D.C., 72.

This exception was overruled.

The defendant then pleaded that the plaintiff having failed to complete his contract he (defendant) had a right to retain occupation of the premises.

The facts as deposed to by the plaintiff were as follows: On the 15th June last he saw the defendant who told him that he had rented a steam mill and wanted to let his windmill, telling the plaintiff at the same time that it was a good chance for him. Defendant mentioned the rent as being £30 a year. Plaintiff said he would think the matter over. After further negotiations the plaintiff agreed to take the mill for one year at a rental of £25, the plaintiff to find security for the payment of the rent, and in consideration of the reduction the defendant to retain possession of the sheep kraal, wagon-house, and part of the loft of the dwelling-house. A written contract to this effect was to be drawn up.

The plaintiff obtained a surety on these terms, took possession of the mill, and had a written agreement drawn up. When however the plaintiff and his surety came to the defendant for his signature he refused to execute the agreement unless the surety further bound himself for the re-delivery of the mill to the defendant in good order, this the surety declined to undertake and the defendant retook possession of the mill.

The defendant in his evidence stated that he had never given up possession of the mill, but that he merely allowed the plaintiff to occupy it pending the finding of security.

The Magistrate gave judgment for the plaintiff, and ordered the defendant to give up possession of the mill and pay £5 damages with costs.

The Magistrate gave the following reasons for his judgment: I overruled the exception taken by Mr. Taljaard, as the only future rights indirectly involved were the lease, for one year only, of the mill at £25, which amount is within my jurisdiction. In this respect the cases quoted by Mr. Taljaard do not apply. The plaintiff is a poor man and could not afford to bring a case before a Superior Court, and it is, I think, clearly proved from the evidence:

1. That defendant leased the windmill to plaintiff for one year at £25 on the sole condition that he should find security for the lease rent £25.

2. That about the same time defendant became possessed of a steam mill, which was the cause of his letting to plaintiff the windmill which he had hitherto worked.

3. That defendant gave plaintiff the keys of the house and windmill and was satisfied with the security offered.

4. That before the lease was signed but after plaintiff was in full possession of the windmill and premises a portion of the machinery of the steam mill got out of order and defendant could not work it.

5. That thereupon defendant called upon plaintiff to furnish further security—which he could not find—as a pretext for regaining possession of the windmill and so being able to execute orders from his customers to grind corn therewith.

(6) That defendant violently took possession of the mill against plaintiff's will, and that plaintiff was in consequence unable to work it and thereby suffered loss and damage to the extent of £5.

The defendant now appealed.

Mr Watermeyer, for the appellant, relied on *Bertram v. Wood* (3 Sheil, 167.)

Mr. Buchanan for respondent as to the second part of the claim cited *Voet* (2, 1, 48.)

The appeal was allowed with costs.

De Villiers, C.J.: The summons in the Court below contains two claims both arising out of the same transaction, namely, the lease of a windmill by the defendant to the plaintiff. The first claim is in effect for specific performance of the contract of lease, and the plaintiff's counsel has candidly admitted that it was beyond the Magistrate's jurisdiction. Even

if it were treated as a claim for ejectment it would not fall within the class of cases specified in the 10th section of Act 20 of 1856 as falling within his jurisdiction. The second claim is for damages for wrongful eviction, and the defence is that the lease was never executed. I am satisfied from the evidence that whether the defence be good or bad the defendant honestly believed it to be a valid defence. If valid it would have the effect of extinguishing the plaintiff's claim and therefore upon the principles laid down in *Bertram v. Wood*,* the objection to the jurisdiction ought to have been sustained. But independently of those principles the objection to the jurisdiction was a good one. If any part of the summons was beyond the Magistrate's jurisdiction, the whole was beyond his jurisdiction. The 8th section of the Act gives him jurisdiction in all illiquid cases in which the debt or damages demanded does not exceed £20, and therefore if the total sum demanded in one and the same summons exceeds that amount the Magistrate cannot adjudicate upon any part of the summons. The passage in *Voet* (2, 1, 48) quoted by the plaintiff's counsel, even if it otherwise supported his argument, cannot control the express provisions of the Act. But that passage is really opposed to the plaintiff's contention. Commenting upon the nullity of a judgment for a larger sum than the Judge had jurisdiction to award, *Voet* says, in effect, that such a judgment given in one and the same suit, cannot be valid as *res judicata* in part and invalid in part, unless it were upon separate counts unconnected with each other, some of which, but not all, exceed the Judge's jurisdiction. In the present case there is the closest possible connection between the two counts. If the plaintiff had applied for leave to amend the summons by striking out the first count, the Magistrate could have allowed it in case the defendant would not be prejudiced thereby, but without such amendment the exception ought to have been sustained. The appeal must therefore be allowed, with costs here and below.

[Appellant's Attorneys, Messrs. Reitz & Herold; Respondent's Attorneys, Messrs. C. & J. Buissinné.]

FREDERICKS V. JAFFAR. { 1895.
Nov. 4th.
Magistrate—Jurisdiction—*Res judicata*—
Maintenance.

The plaintiff, who had obtained judgment in a Magistrate's Court for £12 for the

maintenance of an illegitimate child until the date of summons, afterwards brought an action in the same Court for £20 for maintenance subsequent to that date, but, on exception taken, the Magistrate decided that he had no jurisdiction.

Held, that as the two actions were separate and distinct, the Magistrate had jurisdiction in the second action to decide upon a claim for maintenance not included in the first.

Jordaan v. Peters (Buch. 1879, p. 203) distinguished.

This was an appeal from a decision of the Resident Magistrate of Port Elizabeth in a case tried before him on the 9th July, 1894, in which the present appellant, plaintiff in the Court below, sued the defendant, now respondent, for £6 16s. 6d. for the maintenance and support of an illegitimate child from the 1st September, 1894, until the 1st July, 1895, being thirty-nine weeks at 3s. 6d. per week. The case was postponed until the 16th July, and again postponed until the 23rd July, on which date the defendant pleaded *res judicata*.

By consent the record was put in in a previous case, heard on the 31st July, 1894, between the same parties, in which the plaintiff claimed £20 for lying-in expenses and for the maintenance and support of the child from the 9th June (the date of the child's birth) to the 28th July, 1894. The hearing of this latter case was postponed until the 2nd August following, on which date the defendant consented to judgment being entered against him for £12 and costs. It was with reference to this judgment that the defendant in the second action pleaded *res judicata*.

The Magistrate dismissed the case on the grounds of want of jurisdiction.

The following were *inter alia* his reasons: This (the judgment by consent) was a final judgment and therefore, in my opinion, a bar to any further claim in this Court. The case of *Jordaan v. Peters* (Buch. 1879, p. 203) governs this case, but for the plaintiff it is contended that this Court has jurisdiction to award a sum for maintenance from time to time so long as the amount claimed in one summons does not exceed the sum of £20.

In my opinion the plaintiff having elected to come into this Court in the first instance for £20 must be held to have assessed her claim against the defendant at that amount, and having accepted a judgment for £12 and

* 3 Sheil, 167.

costs she did so in full and complete satisfaction of her claim against the defendant. This Court therefore has no jurisdiction, and the further claim for £6 16s. 6d. was dismissed.

The plaintiff now appealed.

Mr. Graham was heard in support of the appeal.

The Court allowed the appeal.

De Villiers, C.J.: The Magistrate seems to have misunderstood the decision in *Jordaan v. Peters* (Buch., 1879, p. 203). It was in some respects a peculiar case, for, although the plaintiff claimed £1 a month for a period of twelve years, no exception was taken to the jurisdiction either in the Court below or in this Court. The appeal to this Court was upon a question of fact and the appeal was dismissed, but on further consideration the Court held that it could not confirm the judgment as it stood inasmuch as the amount awarded was in excess of the jurisdiction. The Court, therefore, reduced the amount to what the Magistrate could have legally awarded in one and the same action. In the present case there is no claim for more than the Court below could legally award. It is true that, in a previous action, judgment had been given by the same Court against the defendant for £12 on his own confession, but that was for maintenance before July, 1894. The claim in the present case is for maintenance subsequent to that date, and was not included in the previous case. The plaintiff's two actions, therefore, were separate and distinct. The judgment in the one action cannot be regarded as *res judicata* in the other. It is true that the cause of action is the same but the thing claimed is different. Of course if the previous action had been, as in *Jordaan v. Peters*, for future as well as past maintenance, then the plaintiff could not have instituted an action for any portion of such future maintenance, because the thing claimed would have been the same. But upon the summons, as it stood, the Magistrate clearly had jurisdiction and the case must therefore be remitted to him to be tried on its merits.

Mr. Justice Upington: It seems to be quite clear. I was under the impression at first that the original claim for maintenance had been a general claim, which is a very different thing from a specific claim for a specific amount for a definite period.

[Appellant's Attorney, G. Montgomery-Walker.]

SUPREME COURT.

[Before Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), and Sir THOMAS UPINGTON, K.C.M.G.]

RANDALL V. GRAY.—*Re* "THE { 1895.
BLAIRHOYLE." { Nov. 5th.

Salvage—Towage—Tender.

Salvage reward must be proportioned to the risk incurred by the salving vessel as well as to the danger of the vessel rescued from danger.

The barque B., valued together with her cargo and freight at £14,000, having been considerably damaged by a gale, was rescued from a position of probable but not imminent danger about five miles from the shore and towed for about nineteen hours into a harbour by the steamship C., valued with her cargo at £18,300, but the sea was calm and the risk to the salving vessel was small.

Held, that the sum of £1,000, which had been tendered, was a fair and generous remuneration for the services performed.

This was an action of salvage instituted by Frederick William Randall, master of the screw steamship *Congella*, and as such representing the owners of that vessel, against William Gray, master of the British barque *Blairhoyle*, and as such representing the owners of the barque and of the cargo on board of her.

The declaration alleged that the *Blairhoyle*, while on a voyage from Rangoon to Ile La Grande, near Santos, in the Brazils, encountered a gale on the 29th August last, which lasted some days, and in which she was dismasted, and in which her bulwarks, stanchions, all sails except three head sails, the boats, and compasses were carried away by the seas.

That on the morning of the 4th September, at about four, the plaintiff, while on a voyage in the *Congella* from the port of Algoa Bay to Mossel Bay and Table Bay, discovered the barque about midway between Cape St. Francis and Seal Point, on the east coast of the Colony. The barque was heading for the shore and was about five miles therefrom, and was flying signals of distress.

The plaintiff stood by the barque until day-break, when he lowered a boat in order to rescue the master and the crew of the barque, and

thereafter he took the barque in tow and brought her safely into the port of Algoa Bay. The barque, when taken in tow, was wholly disabled and in the condition aforesaid, and in a position of imminent danger, and the lives of the master and crew were in imminent danger, the barque having no boats; and but for the services rendered by the plaintiff and his ship, the barque would have become a total wreck, and the cargo would have been wholly lost or destroyed. The said services were rendered by the plaintiff and his crew with great difficulty and danger to themselves and to the vessel *Congella*.

The *Congella* has 1,021 tons register, and with her cargo a value of £50,000. The *Blairhoyle* has a register of 1,291 tons, and a value in her damaged condition of £1,000. Her cargo, which is rice, is valued at £17,000, and the freight due upon it is £2,700.

The plaintiff claimed £5,000, with interest *a tempore morae* and costs.

The defendant in his plea, admitted the formal allegations in the declaration. He denied that the boat was lowered in order to rescue him and the crew of the *Blairhoyle*. He denied that his ship was entirely dismasted, and that all her bulwark, stanchions and compasses were carried away by sea. He said that the foremast and foretopmast with their yards, and the mizen and mizentopmast were left standing, and that besides the three head sails remaining, the ship had a complete set of sails, and had three compasses left on board.

He said that the barque when taken in tow, though much damaged, was not wholly disabled. He admitted that there was danger to the barque and her master and crew, but not imminent danger. He admitted that the barque had no boats, and might probably have become a total wreck, and that the cargo might probably have been wholly lost or destroyed. He said that the services rendered were in fact, though difficult, not dangerous to the plaintiff and crew of the vessel *Congella* or to the vessel herself.

He said that in her damaged condition the *Blairhoyle* was of the value of £200, that her cargo of rice was also damaged wholly and its value materially reduced, and that the freight still due or to be earned was £2,300, £400 having been advanced at Rangoon.

He referred to such proof as the plaintiff might adduce of the value of the *Congella* and her cargo, but he did not admit that the value was £50,000.

He admitted that he refused to pay £5,000 in respect of the plaintiff's claim, which he said was excessive. He said that he had tendered and offered to pay the plaintiff the sum of

£1,000 with taxed costs, which tender he renewed, and subject to the tender, he prayed that the plaintiff's claim might be dismissed with costs.

Issue was joined in the replication, which admitted the tender, but alleged that it was insufficient.

Mr. Rose-Innes, Q.C., and Mr. Juta, Q.C. appeared for the plaintiff.

Mr. Shell and Mr. Close for the defendant.

A consent paper was signed and put in, from which it appeared that the value of the *Congella* was £16,000, her cargo £2,300, and the freight at risk £450. Value of the *Blairhoyle* in her damaged condition £200, if repaired £1,000. Cargo £12,000. Freight due to port of discharge £2,700, of which £400 had been advanced to the master at Rangoon. Distance freight if the voyage terminated at Algoa Bay £1,450.

The evidence went to show that on the 1st July last the *Blairhoyle*, laden with a cargo of rice in bags, left Rangoon on a voyage to Ile La Grande near Santos in the Brazil. Nothing calling for particular comment occurred, the weather being generally fine, until the 28th August, towards the latter part of which day a heavy sea set in from the south-west, a fresh breeze blowing from the same quarter; the like weather continued on the following day, a heavy squall at half-past nine o'clock carrying away the mizen stay-sail and foresail. At midnight the wind, blowing from west to west north-west, had increased to a fresh gale and a heavy sea still continued to run from the south-west; later on in the day the wind became more moderate, but the heavy south-west sea continued to run; the next day the 30th of August, began with a moderate gale from the west and heavy sea; later on the wind increased, to a heavy gale and the sea likewise increased causing the vessel to labour heavily and to ship large quantities of water; at eight o'clock some heavy seas rushing over the vessel carried away some of the topgallant bulwarks, loosened the hatch covers and some of the spare spars on deck and carried away the steps at the break of the poop on both sides; at noon the gale was still blowing fresh from west by north but seemed clearing; the wind, however, continued heavy causing the vessel to labour very heavily and to take large quantities of water on board; the following day, the 31st August, the weather continued the same, the wind being still from the west; at four o'clock the wind somewhat moderated, but the heavy sea continued, the vessel labouring heavily; at eight o'clock the weather was the same; at nine o'clock heavy squalls set in, the

sea still running high; at ten o'clock in about latitude 34°44' S., and longitude 25°50' E., a heavy sea struck the vessel, carrying away the mainmast fifteen feet above the deck with all yards, rigging and sails, the foretopgallant and foreroyal masts with yards, rigging and sails, the mizen topmast and spanker gaff, about thirty-six feet of the port bulwarks, twenty-five feet of the starboard bulwarks, all skids and all boats (except a small dingy), and everything movable on deck; the after hatch was also stove in, the main ventilator lifted, the taffrail on the poop and the galley stove in and broken, the cabin bulkheads started, one of the chronometers damaged by water, the wheel sprung, the cabins flooded, the decks out in several places, stores damaged and much other injury done; as soon as possible the hatches were battened down with canvas and planks, the wreckage cut away, the cabins bailed out and things got ship shape as far as possible, paraffine and linseed oils were used to still the seas with good effect. At half-past five o'clock it was blowing a light breeze, the sea was going down and the weather clearing up; at noon the weather was clear with a moderate breeze, and the sea was still going down. As soon as possible after the disaster, the vessel stood in for the land with the intention of making for Algoa Bay or falling in with a passing steamer. On the 1st day of September little or no headway was made, the vessel being under fore-topmast and mizen staysails. On the 2nd September, during the night a passing steamer was sighted bearing north-west, and blue lights were burnt to attract her attention but without effect. The Blairhoyle thereafter proceeded slowly without mishap, still heading towards the land with light and variable winds under foresail spanker and inner and outer jibs set till about four o'clock on the morning of the 4th day of September, when, on the captain going on to deck to wear the vessel off the land, a steamer which afterwards turned out to be the Congella was sighted passing in about latitude 34°10' and longitude 24°23' east. Distress signals were at once made to attract her attention, with success, for shortly after a boat of the Congella came to the vessel and took the captain to the Congella, where it was arranged that the Congella should take the vessel to Algoa Bay. On the return of the captain to the vessel she was taken in tow at 8.45 a.m. and thereafter brought into Algoa Bay by the steamer at 7.10 a.m. on the 5th day of September last. At the time the vessel was taken in tow she was about forty miles west of Cape St. Francis, and as far as could be judged about four or five miles from

the shore. During the time the vessel was in tow the weather was fine and the wind and sea light. She was towed a distance of about ninety-nine miles, which occupied nineteen hours.

There was considerable conflict of evidence between the plaintiff and his officers and the defendant as to what passed between them when Captain Gray was on board the Congella.

According to the plaintiff's evidence Captain Gray expressed his determination to have beached or scuttled his ship and to have got the crew off in a raft if he had not fallen in with the Congella. This was denied by Captain Gray, and his first and second officers swore that in all the consultations which they had had in regard to the condition of the ship nothing was ever said about beaching or scuttling her, nor was the contingency of being obliged to take to a raft ever contemplated.

The same witnesses deposed that after the gale had abated the Blairhoyle answered her rudder and was in every respect under complete control, and in proof of these statements they referred to the fact that between the abating of the gale and their falling in with the Congella the Blairhoyle had voyaged a distance of over 100 miles. They further stated that when the Congella was sighted the Blairhoyle was not in immediate danger of going ashore, that there was a dead calm at the time with very little swell towards the land, and that with a favourable wind from either the west or east the vessel could have made a port, the more so as they had spars sufficient on board to rig up a jury mainmast.

There was considerable difference of opinion amongst the expert witnesses. Those called for the defendant being of opinion that the Blairhoyle, with the canvas and spars at her disposal, could have made a port, whereas the plaintiff's witnesses stated that this was impossible as the ship was unmanageable. About one o'clock on the morning of the 5th September whilst the Blairhoyle was in tow her hawser parted, and in endeavouring to pass another hawser from the Congella to the Blairhoyle a 4-inch rope used as a messenger line parted and fouled the shaft of the propeller.

The first officer of the Congella deposed that he was aware of this circumstance at the time and that he afterwards reported it to the chief engineer. The latter denied however that any such report was made to him. The Congella remained about a day in Algoa Bay, and on being tipped in Table Bay eighteen or nineteen turns of the rope were found round

the shaft of the propeller. Evidence was led to show that in consequence the *Congella* ran considerable risk of total disablement.

As a ground of special damage evidence was directed to show that in consequence of the *Congella's* returning to Algoa Bay with the *Blairhoyle* the former vessel lost her turn to India and consequently her freight, her turn being taken by another vessel, the *Umzinto*, of the same line, Bullard, King & Co. This firm are the managing owners of the line, but the shares in each ship are held in unequal proportions, and the accounts of each ship are kept separately and divided among the owners. A point was attempted to be made that in consequence of the *Congella's* losing her turn to India some of the owners had lost freight, the loss being estimated by one of the owners at from £1,200 to £1,300.

Mr. Rose-Innes, Q.C., for the plaintiff: It is not denied that the present case is one of salvage, and that being so the only question for the Court is the sufficiency or otherwise of the tender. It is submitted that the tender is not sufficient under the circumstances. This case is practically on all fours with the *Leif* (5 Sheil, 338).

The Chief Justice: There appears to me to be no similarity between the two cases. The *Leif* was a derelict and in such cases large remuneration is always awarded.

There may be cases in which a vessel which has not been abandoned may be in a more hopeless condition than one which has been abandoned. See the judgment of Dr. Lushington in the *True Blue* (1 P.C., 250).

Much greater risk was incurred by the *Congella* than by the *Sir Frederick* in consequence of the fouling of the propeller. The Court would also bear in mind the loss of freight incurred by the owners of the *Congella* in consequence of having to return to Algoa Bay.

It is submitted that a sixth of the value of the *Blairhoyle* cargo and freight would be a fair remuneration.

Mr. Sheil was not called upon.

De Villiers, C.J.: It is not necessary to hear counsel for the defendant. For the purpose of our judgment it may be assumed that this is a case of salvage. The amount of £1,000 which has been tendered, far exceeds the highest charge which could have been allowed for mere towage, and the services performed, in rescuing the *Blairhoyle* from a dangerous position, were in many respects meritorious. She had been considerably damaged by a severe gale, and was drifting in the direction of a rocky coast, and at the time when she was taken in tow, she

seems to have been only about five miles from the shore. I am satisfied, however, that the danger of immediate stranding has been somewhat exaggerated by some of the plaintiff's witnesses. The sea was calm and there is nothing to show that a safe anchorage could not have been found until a fair wind arose which could take the ship, damaged though she was, safely to Plettenberg Bay or to Algoa Bay, or until a tug could be signalled for to tow her to either of these ports. The present case differs materially from that of the *Leif*,* recently decided in this Court, which is mainly relied upon on behalf of the plaintiffs. That vessel had been abandoned by the master and crew at a time when the sea was rough, and in her derelict condition she would of a certainty have been immediately driven on to a still more dangerous coast by a tide which was flowing fast in that direction. The salving tug also encountered heavy weather while towing her into harbour. Accordingly one sixth of the value of the ship, cargo and freight was awarded to the owners of the tug. The Court has been pressed to award a similar proportion to the owners of the *Congella*, but in cases of salvage it is impossible to adopt a fixed proportion applicable to every case. The risk to the salving vessel is a most important ingredient, and in the present case the risk was certainly not great, for the sea was calm and the coast was well known to the master. It is true that part of the towing rope got round the propeller, but this is a risk which any vessel which takes another in tow runs and may be avoided by ordinary skill and care. The damage done was small, and indeed she seems to have steamed from Algoa Bay to Table Bay without the fouling having been discovered. The chief merit of the service consisted in the *Congella* arresting her voyage for the purpose of taking the distressed ship back to Port Elizabeth, and undoubtedly, if any resulting loss had been proved such loss would have to be added to the remuneration which the service itself entitled the owners to. But the evidence of such resulting loss is extremely vague. The *Congella*, it is said, was unable to proceed to India and the *Umzinto*, which belonged for the greater part to the same owners, had to take her place. The resulting damage is exceedingly remote, and no freight was really lost in consequence of the delay of three days. The delay need not have been more than about two days, for it took only nineteen hours to tow the *Blairhoyle* to Algoa Bay and the return voyage would have taken less. It was to the credit of the master that he

* Supra p. 338.

arrested his voyage at all for the purpose of assisting another ship in distress, but the evidence leaves no doubt on my mind that he rates his own services too highly. The owners are entitled to be awarded upon a liberal scale, and if the amount tendered had fallen short of what I conceive to be generous remuneration for the services performed I would have had no hesitation in increasing the amount and awarding costs against the defendant. On the other hand, this Court has always encouraged the avoidance of litigation by means of reasonable tenders, and if the tender of £1,000 is a reasonable one the defendant should not be mulcted in the costs. In the opinion of the Court the tender is fair, reasonable and generous, and the judgment of the Court will therefore be for the plaintiffs for the amount tendered with costs up to the date of tender, but they must pay the defendant's costs subsequent to that date.

Sir Thomas Upington: I concur on every ground.

On the application of Mr. Sheil, the expenses of Captain Gray as a witness were allowed.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorneys, Messrs. Scanlen & Syfret.]

KEESE V. SIMES.

Mr. Molteno applied, on behalf of Louis Frederick Keese, of Lady Grey, Aliwal North district, for the appointment of a provisional trustee in the insolvent estate of Simes, with power to sell the effects.

The application was granted.

SUPREME COURT.

[Before Sir HENRY DE VILLIERS, K.C.M.G. (Chief Justice), and Sir THOMAS UPINGTON, K.C.M.G.]

ROSSOUW'S EXECUTORS V. OLIVIER { 1895.
AND ANOTHER. { Nov. 6th.
PERKS V. CARROLL'S EXECUTRIX. {

In both these cases judgment was entered for the plaintiffs in terms of consent papers signed by the defendants.

REGINA V. DE WINDECK. { 1895.
Nov. 7th.

Convict—Leave to appeal.

Under special circumstances the Court allowed a convict, who was undergoing a term of twelve months' imprisonment for theft, to be heard in appeal from the sentence passed upon him by a Magistrate.

In this case the prisoner John S. de Windeck, alias the Count De Windeck, appeared before the Court to ask for leave to appeal against his conviction and sentence to twelve months' imprisonment with hard labour by the Resident Magistrate of Cape Town on a charge of theft of a gold watch and chain.

Mr. Giddy for the Crown.

The Chief Justice (addressing the prisoner): I understand that you wish to apply now for leave to appeal in this case?

De Windeck: I understood, my lord, that leave was granted. I received a communication a week ago at the Convict-station, informing me that leave was granted me to appeal, and that the 7th of November was set down as the date.

The Chief Justice: Have you got the letter?

De Windeck: I believe a constable has it.

The letter having been handed to their lordships,

The Chief Justice read the letter, which was addressed by the Sheriff to the appellant, and was to the effect that the latter, if he wished to be heard for leave for appeal, could be so heard on November 7 before this Court, and state his case. In view of the admissions made in the letter sent by the appellant to the Magistrate (proceeded the Sheriff), perhaps the question of appeal to the Supreme Court might be thought over again.

The Chief Justice: There is no statement there that leave to appeal is allowed.

De Windeck: Then I must have misunderstood.

The Chief Justice: Clearly, you have misunderstood. The only question we can hear now is whether you can be allowed to appeal.

De Windeck: I wish to appeal on the ground that the prosecution was conducted in such a way as to prejudice the Magistrate against me from the outset. One witness who appeared for the prosecution made no statement whatsoever, but questions were put to her read from a paper prepared by Inspector Clark, who conducted the prosecution. She simply said "Yes," and was extremely agitated at the time. I for myself never expected to come up at all. I did not

cross-examine her as I ought to have done. I was stunned and dazed physically, and I was unable to utter a word. I simply could do nothing. Then when I came up the second time on remand the case was only heard formally, and on the third remand I was allowed to make a statement giving my evidence, and I was also allowed to cross-examine witnesses, but in a very meagre way. My principal ground for appeal is this—that the prosecution made me out to have been a designing, scheming hypocrite, trading upon my religious professions, and inducing these good people to do things for me which they would not have otherwise done, while no such thing has been the case.

The Chief Justice: The only charge against you is that of theft. The question of being a hypocrite and all that has nothing to do with the matter. The question was whether you committed theft. That was the only question which the Magistrate had to decide, and he decided that you were guilty and sentenced you to twelve months' imprisonment with hard labour. The gravest evidence against you is that you have admitted the offence.

De Windeck said that when he was in the dock he admitted that he had used the watch, but that he had been authorised to use it, and that he looked upon it as his property. Mrs. Murphy authorised him to keep it, and it was painful to him at the time to be accused of having stolen it. He never for one moment realised what his position was.

The Chief Justice: But this watch was left in your charge, you got payment for it, and you kept the money and appropriated it to your use.

De Windeck: I did not sell the watch in so many words, but I exchanged it for another.

The Chief Justice: What became of the other watch?

De Windeck: I disposed of that afterwards.

The Chief Justice: And you got money for it?

De Windeck: Yes.

The Chief Justice: What became of the money you got for the watch?

De Windeck: It amounted to £5 10s. altogether.

The Chief Justice: What became of it?

De Windeck: That I spent.

The Chief Justice: Oh! It seems a hopeless case for you.

De Windeck: I admit my guilt to that extent, my lord. It appeared to me that for what I was guilty of, the sentence was far too excessive.

Mr. Giddy having read the statement made by De Windeck to the Magistrate,

The Chief Justice said that in his letter to the Magistrate afterward, the appellant practically admitted his guilt.

De Windeck: Yes, my lord.

The Chief Justice: I cannot lose sight of the fact that you had previously been convicted of theft by the Magistrate—

Mr. Giddy: Yes, my lord: For the theft of trousers, ten days' imprisonment with hard labour.

The Chief Justice (continuing): For the theft of a pair of trousers and a coat, for which you received ten days' imprisonment with hard labour. You see that sentence did not serve as a warning to you, and so, of course, the Magistrate had to pass a severe sentence.

De Windeck urged that if he had been a swindler he could have appropriated large sums of money which had been entrusted to him.

The Chief Justice: Mr. Giddy, as the applicant is here, under the circumstances I think the evidence upon which the conviction was obtained should be read, as he has come here in the belief that he was allowed to appeal.

Mr. Giddy offered no objection, and the evidence taken before the Magistrate was then read.

The Chief Justice asked what kind of a home the home referred to in the evidence was.

De Windeck: It is a home kept by Mrs. Murphy for the purpose of affording country air to people—men and ladies—engaged in mission work. It is by no means a home for destitute people, as the name might seem to indicate.

The Chief Justice: Were you engaged in mission work?

De Windeck: Yes. In looking after the poor and destitute, and especially the drunken people in Cape Town. Nobody living at the farm is destitute. Everybody residing at Mrs. Murphy's is in the habit of giving her money, sufficient in amount to cover her expenses. Proceeding, he stated that part of the statements given before the Magistrate as to his representations was correct, and a part was not correct. He never said that his name was Count Spencer de Waldeck. He had never used that title to trade upon. Indeed, he did not look then as he looked now. If he had wished to trade upon his title he could have done so. The statements with regard to his estates were in the main correct. He had told people that he had lost heavily on Stock Exchange speculations, and he had incidentally mentioned that he was interested in dynamite. He also mentioned that he went about the City of London and acquired a taste for Stock Exchange speculations, as a result of which he became heavily involved, and became ruined. He had also stated that the mortgage

on his estates in Yorkshire could not be paid off for some years, and that some time next year he would enter into a small regular income. He had never stated that he would be free altogether. He could call witnesses to prove that. He could assure the Court that thoughts of theft and scheming had never entered his mind. He would ask their lordships to take into consideration the physical and mental suffering he was now undergoing, which would mean ruin to him. He now received small remittances from England.

The Chief Justice, in giving judgment, said, addressing the prisoner: In strictness you had no right to be allowed to appeal at all, as a Judge has already confirmed the Magistrate's judgment, but under all the circumstances we allowed the depositions to be read, and if there had been anything in the depositions to justify the Court in reversing the decision of the Magistrate, the Court would have seized any evidence for the purpose of relieving you. But the evidence in this case is conclusive as to your guilt; in fact, you have admitted your guilt. You seem to be a man of considerable education, and you must have known that you were doing a thing which is prohibited by law when you disposed of the watch which had been lent to you by this lady, to whom you represented that your circumstances were wholly different from what they were, for the purpose, apparently, of getting possession of this watch. The fact that you were engaged in good work, as you say, really seems to advocate this fact, that you gained the confidence of this lady by your representations, by assisting her in the good work in which she was engaged. I confess that if this had been your first offence I should have considered twelve months' imprisonment with hard labour rather too much, too severe a sentence, and I think the Court might then have reduced the term of imprisonment. But seeing that you had been previously convicted for petty theft, for which you were sentenced to ten days' imprisonment with hard labour—but evidently that did not reform you—I confess I do not deem it the duty of the Court in any way to assist you. The application must be refused and the appeal dismissed.

De Windeek was then removed in custody.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

LEAF AND CO. V. VALLENTINE. { 1895.
Nov. 7th.

Mr. Smuts applied for provisional sentence upon a mortgage bond for £695 5s. 11d., and interest at 8 per cent. from July 29, and for the property to be declared executable.

The Court granted the order as prayed.

IN THE MATTER OF THE MINOR JAN D. JOUBERT.

Mr. Giddy applied for the ratification by the Court on behalf of the said minor of certain contract of lease entered into by his mother, whereby a portion of the farm Nooitgedacht, which will devolve on the minor upon her death, is leased for a term of years to the Colonial Government on satisfactory terms.

The Court granted the application.

THE PETITION OF JACOB GUITES.

Mr. Stoney applied for authority to petitioner to dispose of certain lot of ground, being portion of erf No. 6, situate in the village of Middelburg, purchased by him on behalf of his minor son, a good price being offered for the same and it being desirable to sell and re-invest the proceeds.

The Court granted the order on the condition that the money be paid into the Guardians' Fund with leave to the Master to pay it out again upon being satisfied as to the investment proposed by the applicant.

SCOTT V. MCCOLLA. { 1895.
Nov. 7th.

Attachment—Shares.

Shares ordered to be attached and sold in execution of an unsatisfied judgment of the Supreme Court.

This was an application for the attachment of certain shares registered in the name of the defendant.

The applicant obtained judgment against the defendant under rule 319 on the 31st August last.

The terms of the judgment were that the defendant had to render an account within fourteen days, failing which to pay the sum of £59 19s. 6d., being an amount due to the plaintiff for moneys collected by the defendant as an

attorney of the Supreme Court. The defendant was further ordered to return to the plaintiff all documents and papers in his possession belonging to the plaintiff.

The applicant now alleged that McColla had failed to comply with the judgment, that a writ was issued on the 16th September last, and that there had been a return of *nulla bona*. He further stated that he had recently ascertained that McColla was interested in, or the registered owner of, certain shares in gold and diamond syndicates, which he specified, the secretaries of the syndicates being resident some in Cape Town and others in the suburbs.

The prayer was for an order authorising the Sheriff to attach the shares under the writ of the 16th September, and to make them executable.

Mr. Sheil for the applicant.

The Court granted the application.

The Chief Justice said: The Court will grant an order empowering the Sheriff to attach and sell the shares in satisfaction of the judgment. I trust that the allegations made in the petition will be brought to the notice of the Incorporated Law Society.

[Petitioner's Attorney, D. Tennant, jun.]

ROUSELL V. DE STADLER. { 1895.
Nov. 7th.

Barring appeal—Delay—Reasonable excuse
—Magistrate's Court.

An unsuccessful plaintiff in a Magistrate's Court noted an appeal to the Supreme Court but did not set down the appeal for hearing until eighteen months after judgment.

Held, that in the absence of any reasonable excuse for the delay the defendant was entitled after due notice to an order barring the appeal.

This was an application on notice to the respondent that an order would be applied for barring him from prosecuting an appeal noted by him in an action heard in the Court of the Resident Magistrate of Simon's Town on the 12th April, 1894, wherein the respondent was plaintiff and the applicant defendant, and also why he should not be ordered to pay the costs of the application.

The facts are these. On 12th April, 1894, judgment was obtained by the present respondent against the present applicant in the Resident Magistrate's Court, Simon's Town, for the sum of £1 0s. 0d. damages each party to pay his own costs.

On the 16th April an appeal was noted by

the plaintiff, but the defendant heard nothing more about the matter until the 29th October last, on which date he received notice that the appeal had been set down.

Mr. Stoney was heard in support of the application and relied on *Rymer v. Solomon* (2 Sheil, 850).

Mr. Graham, for the respondent: Assuming that the respondent has not prosecuted the appeal in due time it is too late for the applicant, now that the appeal has been set down, to raise this objection. He should have followed the practice in *Rymer v. Solomon*, and called upon the respondent to show cause why he should not be barred from appealing.

De Villiers, C.J.: The delay in this case has been unreasonably long. Judgment was given by the Magistrate in April, 1894, and now in November, 1895, the unsuccessful plaintiff sets down the appeal for hearing. The respondent's counsel contends that the plaintiff ought to have applied—as was done in the case quoted—to bar the appeal before it was set down for hearing, but no such general rule can be laid down. As I am reminded by my brother Upington there may be cases in which the appellant is a man of straw, and it would be unjust to the successful party in the Court below to require that he shall go to the expense of a possibly needless application. He might fairly assume that after so long a delay the intention of appealing had been abandoned. After a delay of more than eighteen months, without any reasonable excuse, the defendant is, in my opinion, entitled to an order barring the appeal notwithstanding that it has been set down for hearing.

The application must be granted with costs.

[Applicant's Attorneys, Messrs. J. & O Buissonné; Respondent's Attorney, D. Tennant, jun.]

BOULD AND BARTER V. ABAS. { 1895.
Nov. 7th.

Small debt—Land—Attachment *ad fundam*
dam jurisdiction—Intendit.

In granting an order to attach property to found jurisdiction, and giving leave to sue by edict for the recovery of a small balance of account, the Court directed that the intendit should not be served until the defendant had been communicated with and had refused to pay the debt and costs.

This was the petition of Frank Bould and James Barter, trading together as saddlers and harness-makers at 92, Long-street, Cape Town.

The petition set forth that Hadje Abas, of Johannesburg, was indebted to the petitioners in the sum of £7 8s. 8d., balance of account for goods sold and delivered and work and labour done.

That when the goods were bought by Abas he was then domiciled in the Colony, but that he had subsequently removed to Johannesburg.

That Abas was the owner of certain property in Bree-street, Cape Town.

The prayer was for an order attaching the property to found jurisdiction and for leave to sue by edict.

Mr. Graham was heard in support of the application.

The Court granted an order attaching the property to found jurisdiction, and granted leave to sue the defendant by edict, which was made returnable on the last day of term. The *intendit* to be served at the same time as the notice of trial, personal service if possible. The citation and *intendit* not to be issued until defendant had been communicated with by letter and had failed to pay the money and costs.

[Petitioners' Attorney, D. Tennant, jun.]

WILLIAMS V. WILLIAMS AND OTHERS. { 1895.
Nov. 7th.
" 8th.

Will—Husband and wife—Adiation—Acceptance of benefits—Usufruct—Mortgage by executor.

Husband and wife, married in community of property, made their joint will by which they appointed the survivor and children of the marriage as heirs of the first dying, and bequeathed a certain farm to the children subject to a life interest in favour of the survivor.

The wife died first leaving one child, the plaintiff, and the survivor took out letters of administration and remained in possession of the farm.

In his account of administration he awarded himself a child's portion and did not for twenty years after his wife's death repudiate the will.

Held that, although in his account he awarded to the plaintiff, as her maternal inheritance a sum based upon the valuation of the farm, there was such an acceptance of benefits as to make the legacy of the farm binding

on him at the suit of the plaintiff on her coming of age.

Held, further, that his co-defendants to whom he mortgaged the farm after his wife's death, but not for payment of debts of the joint estate, were not entitled to enforce the bond against more than his half-share of the farm after his death, but that, as to the other half, the bond was valid in the absence of proof that the mortgagees were aware that he had only a life interest in the farm.

This was an action to compel the first-named defendant to file an amended account and to have certain mortgage bonds declared of no force or effect.

The declaration alleged that:

1. The plaintiff resides at Stinkfontein Kroonstad, in the Orange Free State. The first-named defendant, who is the father of the plaintiff, is sued individually and in his capacity as executor testamentary of his wife the late Maria Cornelia Williams; the second and third defendants are farmers residing in the district of Uitenhage.

2. On the 16th February, 1874, the first-named defendant and his wife, the said Maria Cornelia Williams (born Muller), to whom he was married in community of property, executed their mutual will, in terms of which the first dying appointed the survivor together with the child or children born of the marriage to be his or her sole and universal heirs. The will further provided that the movables should be sold within six months of the death of the first dying, so as to ascertain the portions of the heirs, and that the survivor should draw the interest on the child or children's portions during their minority.

3. As to the immovable property of the testators, the will provided that the survivor should remain in possession of such property during his or her life, but that after the death of the survivor the said property should devolve in equal portions upon the children of the marriage or their descendants. In particular, the testators' share in the farm Berg River was so bequeathed for the sum of £500 and their share in the farm Tweefontein for the sum of £110, the said bequest money to be for the benefit of the joints heirs of the testators. The plaintiff annexes hereto a copy of the said will marked A, which she prays may be considered part of this declaration.

4. The testatrix the said Maria Cornelia Williams died on or about the 28th day of May,

1874, leaning the said mutual will of full force and effect. At her death she and her said husband were possessed of one-third share in the said farm Berg River registered in the name of the said first defendant, together with certain property.

5. The plaintiff is the only child born of the marriage of the first-named defendant and the said Maria Cornelia Williams, and she became of age during last year, and before the commencement of this action.

6. The first defendant adiated and accepted benefits under the will aforesaid, and duly took out letters of administration as the executor testamentary of his said wife.

7. Thereafter the said defendant framed and filed with the Master of this Honourable Court an account purporting to be a correct administration and distribution account of the joint estate of the said testatrix and himself. By the said account he awarded to the plaintiff, as her maternal inheritance under the said will, the sum of £240 2s. 3d. The plaintiff says that the said account was wrongfully framed, inasmuch as one-third share of the farm Berg River was brought up at the value of £500 as an asset in the distribution of the said estate. The said defendant has remained in possession of all the property in the joint estate, and has not as yet paid anything to the plaintiff by way of maternal portion.

8. The said defendant has, since his wife's death, remained in possession and occupation of the one-third share of Berg River, which is registered in his name.

9. Thereafter the plaintiff became entitled, under the will of her grandparents, to certain share of the farm Tweefontein and to certain other land, and on the 24th October, 1898, transfer was passed, under authority of an order of this Honourable Court, to the said first defendant, as the executor testamentary of his said wife, and as the father and natural guardian of the plaintiff, of the following properties:

(a) Certain one-seventh part or share of and in a certain piece of perpetual quitrent land situate in the division of Humansdorp, registered folio 33, being the place farm called Tweefontein, measuring three thousand morgen.

(b) Certain one-seventh part or share of and in a certain piece of perpetual quitrent land situated as above, being lot No. 905, measuring 711 morgen and 110·7 square roods.

(c) Certain one-fourteenth part or share of and in a certain piece of perpetual quitrent land situate as above, being lot No. 901, measuring 657 morgen and 197 6-10 square roods.

10. On or about the 26th April, 1883, the first

defendant wrongfully and in violation of the rights of the plaintiff, executed a mortgage bond in favour of the defendant, Mackay, for the sum of £450, which bond purported to hypothecate one-sixth share of the said farm Berg River, and on the 1st April, 1884, he similarly executed another mortgage bond for £150 in favour of one Frederick Ludwig Liesching, hypothecating *inter alia* another one-sixth share of the said farm Berg River. The said bond was on April 11, 1892, duly ceded to the said defendant Mackay, who is still the holder thereof by registered cession on the 2nd July, 1892, the said first defendant similarly executed a bond in favour of the defendant Stephanus Ferreira for £400 hypothecating *inter alia* as a second mortgage the two-sixth shares of the farm Berg River aforesaid. All the said bonds stand uncanceled in the Deeds Registry of this colony.

11. The portions or shares of Berg River so hypothecated were portions or shares which had been bequeathed to the plaintiff under the will aforesaid and the plaintiff contends that the said first defendant had no right in law to execute any valid hypothecation of the said portions or shares, and that the said bonds in so far as they purport to burden the said land are of no force or effect.

12. The first defendant neglects and refuses to file an amended and proper account as executor testamentary of his wife and to pay to the plaintiff the amount shown to be due to her upon the said account and he also neglects and refuses to transfer to the plaintiff the properties mentioned in the 9th paragraph of this declaration, which properties belong to the plaintiff and to transfer of which she became entitled upon attaining majority. And all the defendants wrongfully contend that the bonds aforesaid are binding upon the properties hereinbefore mentioned which have been bequeathed to the plaintiff.

The plaintiff claims as against the first defendant:

(a) An order compelling him to frame a duly amended account as executor of the late Maria Cornelia Williams, and to pay to the plaintiff the amount of inheritance shown to be due to her on the face of such account.

(b) An order compelling him to transfer to her the properties mentioned in paragraph 9 of this declaration.

And as against all the defendants:

(c) An order declaring that the mortgage bonds specified in paragraph 10 of this declaration are of no force or effect to bind the property in the said paragraph mentioned or any landed property bequeathed to the plaintiff

under the mutual will aforesaid, and compelling the said defendants to do all things necessary to amend and alter the said bonds and the relative entries in the Deeds Registry.

(d) Alternative relief and costs.

The defendants filed the following plea:

1. They admit paragraphs 1, 4, 5, 8.

2. They admit the execution of the mutual will by the first-named defendant and his wife, who were married in community of property, and that the first dying appointed the survivor and the children born of the marriage to be her sole heirs of all her property, movable and immovable, and that the movables should be sold, and that the survivor should draw the interest on the children's portions during their minority; but they deny the other allegations in paragraphs 2 and 3, and beg to refer this Honourable Court to the terms of the original will itself.

3. As to paragraph 9, they deny that the plaintiff became entitled to any property under the will of her grandparents, and say that the land in paragraph 9 mentioned was bequeathed to the plaintiff's mother, and all rights to the said property were vested in the plaintiff's mother at the date of her death, and formed part of the community existing between herself and her husband, the first-named defendant.

4. The first-named defendant duly took out letters of administration as executor testamentary, but the defendants deny that he adiated and accepted benefits under the will.

5. Thereafter the first-named defendant as such executor framed and filed the account, copy of which is annexed, with the Master. By virtue of the community he was entitled to one-half of the estate, movable and immovable, and to a child's portion under his wife's will, and he says that the property was duly and properly valued, and that the said account is a true and correct account, and the first-named defendant, under the *bona-fide* belief that he was entitled to deal with the estate as in the account contained, and that the immovable property so taken over by him in the said account was his property, expended large sums of money in permanent improvements thereon, to the amount of £1,000, by which the said property has been enhanced in value. Upon the said account there was due to the plaintiff the sum of £240 2s. 3d. as and for the plaintiff's maternal portion under her mother's will, which became payable to the plaintiff upon her attaining majority, and which the first-named defendant is ready and willing to pay to the plaintiff, but the latter disputes the said account, and the correctness of the said amount. Except as

above, they deny the allegations in paragraphs 7 and 9, save that they admit the Order of Court in the 9th paragraph alleged.

6. The defendants admit the execution of the mortgages in the 10th paragraph mentioned and that they stand uncanceled, but they deny that they were executed wrongfully and in violation of the plaintiff's rights, and the first-named defendant says he was entitled so to mortgage them, and the other defendants say that they received the said mortgages *bona fide* and for value from the first-named defendant, who is the registered owner and the executor in his wife's estate.

7. They deny the allegations in paragraph 11.

8. The first-named defendant says he admits he refuses to file another account, but denies that he refuses to pay the plaintiff what is due to her. He admits he refuses to pass transfer as claimed, and all the defendants contend that the said bonds are binding, but they deny the other allegations in paragraph 12.

Wherefore they pray that the plaintiff's claim be dismissed with costs.

Issue was joined on the replication.

Mr. Rose-Innes, Q.C., and Mr. Smuts for the plaintiff.

Mr. Juta, Q.C., and Mr. Molteno for the defendants.

No oral evidence was led on behalf of the plaintiff.

The following evidence was given for the defendants:

Uriah Rutger Williams (one of the defendants) said he was the defendant, and lived at Berg River. He and his wife made a mutual will in 1874, which was drawn up by an agent named Metelerkamp, who had a large practice. In May, 1874, witness's wife died, and in the following month the account produced was deposited with the Master. It had been framed by Metelerkamp. In 1871, witness and his brother were in partnership as miners in Kimberley, and in that year one-third of Berg River was bought by witness on behalf of himself and brother in Van der Walt's estate. He got the money to pay for the land from the Diamond-fields, he paying £100 and his brother the other £100. The transfer of the land was made in witness's name. Shortly afterwards witness left the Diamond-fields and went to live on Berg River and his brother followed. After witness's wife's death witness's brother took possession of his third of the farm. The land was purchased previous to witness's marriage, but in the will he disposed of one-third of Berg River. Transfer was passed to his brother in 1880, when witness went to Basutoland. Between the death of his

wife and the present time he had never thought that the property belonged to his daughter. £500 was a fair value of the property as brought up in the account. He thought that if the plaintiff got £240 the property was his. He never thought that the property belonged to the plaintiff. He was under the impression that his mother-in-law, as long as she lived, owned Tweefontein. He first became aware that there were two lots, 900 and 905, in the estate of his father-in-law and mother-in-law after the death of the latter. He had never taken possession of these lots or of Tweefontein. He had never received a penny from the estate of his father-in-law or mother-in-law. The main source of income on his farm were orange trees. Since his wife's death he had increased the number of fruit trees on the farm. Witness married again in 1880. Since his first wife's death he had bought with his brother another portion of Jagersfontein and Lourie's River and had improved the third of the portion of the Berg River farm belonging to him. He had built a house on the farm, the material for which was obtained from Mr. Mackay, who afterwards obtained a bond on the property. The building of the house cost £800, not including his own labour. His yearly income varied, but averaged about £300. Last year he made £500, while during the year that his wife died he made only £100. He had further improved his farm by fencing it, and had brought water on to the farm by means of a furrow, which cost from £800 to £1,000. He knew Mr. Newton, a farmer of Uitenhage, who had valued witness's farm. Witness valued the improvements he had made upon the farm at £1,600 or £1,700. Since his second marriage he had passed a "kinderbewys" in favour of his child for her portion of the estate. He was willing to pay the plaintiff £240.

Cross-examined: I have made no actual tender to plaintiff. Metelerkamp drew up the deed of purchase and sale of Berg River. In 1880 I signed declaration of sale to my brother. I got no money then. The third share is undivided. My brother built his house before 1880. When my wife died I left everything in Metelerkamp's hands. I have heard that Mr. and Mrs. Muller left Tweefontein to the Muller family and two lots to daughters and descendants. I signed the agreement as father and natural guardian of plaintiff and made an affidavit saying that I would transfer only life interest in lots. I think plaintiff must get shares out of Tweefontein and two lots. I cannot claim more than life estate. Berg River is different, as £500 was brought up in account for it. The improvements referred to were made between 1874 and this year. The

bond to MacKay for £450 was for material. Berg River was the only place I had to live on and I would have improved it in any case. I have seven or eight children by my second marriage. I have bought other properties since I bought Berg River. After my mother-in-law died in 1878 plaintiff came to me, but left again in 1891. Plaintiff and my present wife did not always get on well together.

Re-examined: I paid £112 10s. 0d. for one-sixth, and for one-third with my brother £200.

Per C.J.: In framing the account I did not understand it very well, but I intended to carry out the provisions of the will. What Metelerkamp did I thought was right.

John MacKay, sworn, states: I reside at Uitenhage. I am one of the defendants. I remember the death of last witness's wife in 1874. The house on Berg River was not then built. Williams got materials from me. Metelerkamp assured me that everything in the estate was in order. I did not know the provisions of the will. Metelerkamp had a high reputation as a business man. Before 1874 there was nothing on Berg River but a small residence and orchard. Very considerable improvements have been made since. I agree with Newton's valuation. I know nothing of income from farm, but it is a good fruit farm not a corn farm.

Cross-examined: The bond of £450 was for money advanced for materials. I was then out of business.

Isaac Newton, sworn, states: I am a farmer residing in the district of Uitenhage. I valued in September last the improvements on Berg River, as pointed out by defendant Williams. I could see that the bulk of the trees had been planted since 1874 (valuation list put in). I valued improvements at £1,630.

Cross-examined: There are a good many orange trees, some of which are old. I do not remember size of orchard in 1874. Defendant Williams has separate orchards from his brother, as he told me. I think the Divisional Council valuation is too low. Defendant Williams has a nice house on Berg River.

Re-examined: The shares of the brothers are fenced off.

Stephanus Ferreira, sworn, states: I am a farmer in district of Uitenhage, and one of the defendants. I have known Williams for forty years. I knew the farm before the death of his first wife. Great improvements have been made since. The value of one-third of the farm originally would be £300 or £400. Present value with improvements would be £1,600 or £1,700. I was present at sale in Van der Walt's estate, Defendant Williams and his brother

then resided at the Diamond-fields. Metelerkamp died about two years ago. When I took my bond I had no notice that property did not belong to Williams. I thought joint estate had been settled and that he took over property. Since about 1871 W. H. Williams, defendant's brother, has occupied his defined shares.

Cross-examined: I thought my bond was on Louries River. W. H. Williams occupied his share before the death of Mrs. Williams.

(Bonds put in.) Defendants' case closed.

Mr. Innes, Q.C., for the plaintiff: The will establishes a usufruct in favour of the survivor and vests the landed property in the legatees. *Strydom v. Strydom's Trustees* (4 Sheil, 429). If there was adiation the survivor was a mere usufructuary, consequently he had no power to mortgage at all. He had not the *dominium*. *Oosthuysen v. Oosthuysen* (Buch., 1868, p. 51). The later cases can be reconciled with this case.

[The Chief Justice: Are we going to extend the system of tacit hypothecations to *bona-fide* mortgagees?]

This is not a case of tacit hypothec, it is one of *dominium*.

[The Chief Justice: Can a living man pass *dominium* during his lifetime save *coram lege looi*?]

Counsel then cited and discussed *Hiddingh v. Roubaix* (3 Ros., p. 11); *Oosthuysen's Tutrie v. Moffat and Another* (5 Juta, p. 319); *Van Rooyen v. McColl and Others* (3 Juta, p. 284); *Haupt v. Van der Heever's Executors* (6 Juta, 49).

At any rate as regards one half of the property the bonds are invalid.

As regards Tweefontein and the lots adjoining, the defendant Williams has clearly renounced his rights under the mutual will in favour of his daughter. See *Muller's Executors and Heirs v. Williams* (3 Sheil, 119).

Whatever view the Court takes of the will, the account is wrong and must be amended. If Williams adiated the immovable property should not have been brought up. If he repudiated he should have taken half of the estate.

Mr. Juta, Q.C., for the defendant: The cases are all clear that where mortgagees act *bona fide* and there has been no fraud, then certainly the bonds as to half of the property cannot be set aside. The defendant Williams is entitled to the improvements and they must be taken into account; he has acted *bona fide*. *Lind and Others v. Calitz and Others* (2 Sheil, 201).

There has been no adiation. At all events the plaintiff should not benefit at the expense of the mortgagees without compensating them.

Mr. Innes, Q.C., in reply: There has been clear adiation. See *Lucas v. Hoole* (Buch.,

1879, p. 132). Williams cannot adiate in part and repudiate in part.

Cur. ad vult.

Postea (8th Nov.) Judgment was delivered.

De Villiers, C.J.: I have taken the opportunity, since the adjournment, of again reading the judgment of Mr. Justice Connor (Buch., 1868, p. 51), and am confirmed in the view that it does not support the plaintiff's claim to have the bond declared of no effect whatever. In my opinion the bond effectually binds the life interest of the defendant Williams in the one-third share of Berg River and one half of such share after his death. The bond was passed by him as executor of his wife's estate to secure sums of money lent to him by his co-defendants. It is not alleged that they were aware of the provisions of the mutual will, by which the share was bequeathed to the children of the testators subject to a life interest in favour of the surviving testator. The defendant Williams was the survivor. Until his wife's death he had the right of administering the joint estate of which the share in the farm formed part, but upon her death his marital power ceased and he could only deal with her half share either as "boedelhouder" or as executor. In neither capacity could he mortgage her half share. As executor he might sell the half for the purpose of paying her share of the debts, and a *bona-fide* purchaser would be protected even if the sale were not required for the payment of debts. But it is not part of an executor's duty to mortgage the property of the estate which he administers, and a person who lends money on such mortgage does so at the risk of losing his security upon its being proved that the mortgage was not required for the payment of the debts of the deceased. In the present case the mortgage was not required and, therefore, as to Mrs. Williams's half share, the bond must be declared of no effect. As to the defendant Williams's half share, however, the security cannot be impeached without proof of *mala fides* on the part of the mortgagees. In the case of *Oosthuysen v. Oosthuysen* the question to be decided was whether the transfer of a farm made by the executor in favour of his second wife in trust for her children should be set aside at the suit of the legatees under a mutual will made by the executor with his first wife. Mr. Justice Connor held that, after adiation by the survivor, the legacy was binding upon him in respect of the whole of the land bequeathed. If it was binding upon him it was of course equally binding on those to whom he transferred the property by way of donation. But there is nothing in the learned

judge's reasoning to show that the transfer would have been set aside if it had been made by way of a *bona-fide* sale. I have remarked that the farms now in question were bequeathed to the testator's children subject to a life interest in favour of the surviving testator. The words of the will are as follows: "And with reference to our immovable property we declare it to be our express will that the survivor shall enjoy the full and undisturbed usufruct of the same, but after the death of the survivor, the same shall revert in equal shares to all our children, or likewise their legal descendants, more particularly our share of the farm Berg River for the sum of £500, as also our share of the farm Tweefontein for the sum of £110, for the benefit of the joint heirs and such under the following condition, that none of them shall have the right to alienate or to sell his share to strangers, without first having obtained permission thereto from the other proprietors, while they shall have the right to purchase the share of him who may be desirous to purchase the same for the same amount as above mentioned." It is not quite clear who were meant as the "joint heirs" for whose benefit the condition of paying certain sums for the farms was imposed upon the legatees. In the preceding clause the testators had appointed the survivor and the children of their marriage as the sole and universal heirs of all their property, movable and immovable, but when they came to make specific provisions relating to the immovable property they confined the survivor's interest to his or her lifetime. It was only on the survivor's death that the children could be called upon to pay the sums "for the benefit of the joint heirs," and therefore the survivor could not have been intended as one of such joint heirs. On the other hand, if only the children were meant the condition would be of no practical benefit to them, because they would only be paying out what they receive. The only object of the testators in mentioning certain sums of money appears to me to have been in order to fix the proportionate amount which any of the children who wished to sell his portion should be entitled to receive from the others. There was only one child, the plaintiff, and the condition that she should pay those sums for the benefit of the joint heirs is wholly inoperative. The defendants' contention that the surviving testator accepted no benefits under the will is disposed of by the evidence. He has remained in possession of the farm, he has awarded to himself a child's portion of the movables, and he admits that his desire has always been to act in terms of

the will. The only act done by him which could be construed as being inconsistent with the will is that, in framing his executor's account, he had an appraisal made of the Berg River farm and awarded to the plaintiff as part of her inheritance her proportionate share of such valuation. This, however, was clearly a mistake made by the agent employed by him to frame the account, and does not disprove acceptance of benefits in the face of the fact that he did not for a period of twenty years after his wife's death repudiate the will. Under the will the plaintiff is entitled on attaining her majority to her proportionate share of the movables amounting to £120, and for this sum judgment must be given in her favour. She will be entitled, on the death of Williams, to receive transfer of one-third share of the farm Berg River and lands mentioned in the 9th paragraph of the declaration. The mortgages must be declared to be of no effect to bind more than half of the share in the Berg River after the death of the defendant Williams. This judgment must be attached to the transfers in the Deeds Office. The costs of this action must be paid in the first instance by Williams, failing which within one month after delivery to him of taxed bill of costs, to be paid by the other defendants.

[Plaintiff's Attorney, C. C. de Villiers; Defendants' Attorneys, Messrs. Scanlen & Syfret.]

1895.
LIEBETRAU V. LIEBETRAU. { Nov. 8th.

The Court heard further evidence in this case, an action for divorce on the grounds of the defendant's adultery with his stepdaughter. On the 30th August the matter was last before the Court. On that occasion clear evidence was led as to the adultery, but as the defendant was awaiting his trial on a charge of incest, judgment was reserved.

The defendant was acquitted on the charge of incest at the last Circuit Court held at the Paarl.

The further proceeding in the civil case now came on.

Mr. Juta, Q.C., for the plaintiff.

The defendant appeared in person.

Dr. Johannes Neethling, Medical Officer of Stellenbosch, deposed that last September he examined defendant's stepdaughter, Wilhelmina, and found that she was pregnant. Previous to that (in June) the defendant came to him for certain medicine for her, and he declined to prescribe.

Dr. Hahn, professor of chemistry, deposed that he had analysed certain medicine handed

to him. It contained ergot, which was a potent agent in procuring abortion.

Mrs. Liebetrau, the plaintiff, deposed that her daughter Wilhelmina handed her the medicine bottles produced. Her daughter said the defendant had brought them to the house.

Wilhelmina Snibbe, daughter of the last witness, a girl of about seventeen years of age, deposed that the bottles of medicine produced were brought to her by her step-father (the defendant) in May and June last. She used the medicines.

Questioned by the defendant, the witness said he forbade her to tell her mother anything about the medicines.

The defendant entered the witness-box. He said there was no truth in Wilhelmina's statement that he was the original cause of her trouble, or that he had brought her the medicine. Dr. Neethling's statement as to his asking for the medicine he also denied.

In reply to the Court, Mr. Juta said there were three children, aged six years, four and a half years, and one and a half years respectively. The plaintiff was willing that the defendant should have the custody of the eldest child, a boy.

A decree of divorce was granted with costs.

The Chief Justice said: Judgment in this case was postponed because it was known at the time that the witnesses were heard that a criminal prosecution was pending against the defendant for incest, and the Court thought it right not to give judgment then against defendant for fear of in any way prejudicing him at the criminal trial. I presided at the criminal trial at the Paarl, and I expressed my surprise then, which I am bound again to express, that the Crown did not take the trouble to bring forward evidence sufficient to convict the prisoner. No medical men had been asked to examine this girl, and there had been no examination whatever of the contents of the bottles which had been supplied by the defendant to the girl; and the jury having some reasonable doubt, in the absence of such material witnesses, acquitted him. A witness was called on behalf of the defendant named Hutchinson, a chemist, and he denied positively having supplied the medicines which were in the bottles which contained the labels bearing the name of this chemist. He denied positively having supplied the medicine which has been examined by Dr. Hahn, and declared both by Dr. Hahn and Dr. Neethling to be ergot, a very powerful medicine for procuring abortion. I do think some further inquiries ought to be made in regard to the conduct of this chemist. Dr. Neethling now swears

positively that in June last the defendant applied to him for some medicine, and Dr. Neethling very properly refused to supply it, because, as he told the defendant, it would be practically doing a criminal act. It is a pity that the chemist who supplied the medicine was not actuated in a similar manner. Now the defendant positively denies the statement of Dr. Neethling, and between the two I am perfectly satisfied that the evidence of Dr. Neethling is true, and [that the defendant's evidence is false, and if it is false on so material a point I conclude it is false on every other. In the first instance, I felt inclined to believe the girl's evidence, which has been corroborated in every particular by the evidence given to-day. The defendant has spoken about his wife deserting him, and no wonder she deserts a man who was capable of such an act. The evidence clearly establishes adultery, and judgment must be given for the plaintiff for a decree of divorce, with costs, the plaintiff to have the custody of the children of the marriage except the boy named Carl Willem, with reasonable access on both sides.

[Plaintiff's Attorneys, Messrs. Findlay & Tait.]

DIAS V. LAURENCE. { 1895.
Nov. 8th.

Jurisdiction—Resident Magistrate—Lease—
Cancellation of lease—*Bona-fide* defence—
Eviction—Measure of damages.

In a claim for £20 damages in a Magistrate's Court for wrongful eviction the defendant, without excepting to the jurisdiction, pleaded that the written lease had been cancelled by an oral agreement.

The Magistrate having sustained the plea,

Held, on appeal, that, as the evidence did not support the plea but on the contrary satisfied the Court that the defence was not a bona-fide one, the objection now taken to the jurisdiction could not be sustained, and that the plaintiff was entitled to damages.

A lessee, who has been wrongfully evicted, may elect to sue the lessor for damages sustained, or to be sustained, during the full stipulated term, but if in such action he offers no proof of loss beyond the fact that he earned a certain profit while in possession of the leased premises and has not earned any since prospective damages should not be awarded.

This was an appeal from a decision of the Assistant Resident Magistrate of Cape Town in an action in which the present appellant, plaintiff in the Court below, sued the respondent, defendant, for the sum of £20 damages for breach of contract.

The summons alleged that on 29th July, 1895, the defendant agreed to let to the plaintiff a certain coffee-stall for a period of six months from 29th July, 1895, and terminating on 30th January, 1896.

That the plaintiff duly took possession of the coffee-stall and duly paid the rent for the same, but that on the 5th August, 1895, the defendant wrongfully and unlawfully, and without the permission of the plaintiff, took possession of the coffee-stall, and by reason of such unlawful acts the plaintiff sustained damage in the sum of £20, which amount the plaintiff claimed with costs.

The defendant denied the debt.

The facts are as follows: On the 29th July last the parties entered into a written agreement under which the appellant hired the respondent's coffee stall for six months at a rental of £3 per week.

On the 5th August following Dias went to Laurence to pay his rent and the latter expressed himself as being dissatisfied with the way in which the coffee stall was being conducted. According to the defendant's evidence Dias then said to him in effect, "if you are not satisfied you can take the stall back." This part of the conversation was denied by the plaintiff, although he admitted that they had had some words as to the manner in which he was conducting the stall.

The plaintiff then left and on his return to the coffee stall he found the defendant in possession, having ejected the plaintiff's servant who had been left in charge. As the defendant declined to give up possession of the coffee stall the present proceedings were instituted.

At the trial the plaintiff produced his books and swore that he had made £4 clear profit during the week that he had been carrying on the business.

The Assistant Resident Magistrate gave judgment for the defendant with costs.

The following were his reasons: I found that the lease, was cancelled by mutual agreement, and that plaintiff had consented verbally to defendant resuming possession of the coffee stall.

The plaintiff now appealed.

Mr. Graham, in support of the appeal: It is submitted that the Magistrate's judgment was clearly wrong. A solemn contract in writing (which the Court always encourages) had been

entered into between the parties, and it could not be dissolved in the summary method adopted by the defendant.

There was a distinct breach, for which the plaintiff is entitled to damages. Under the circumstances the claim for £20 was not excessive.

Mr. Watermeyer, for the respondent: In this action the plaintiff claimed damages in that while he had a valid subsisting lease the defendant wrongfully took possession of the coffee stall. The defendant pleaded the general issue and in it denied the lease.

The plaintiff is in this position, his claim is based on a lease the validity of which is denied. He can only succeed by the Magistrate finding that there is a valid lease, but this is beyond his jurisdiction, therefore it was impossible for the Magistrate to give judgment for the plaintiff.

It is true that no exception was taken to the jurisdiction in the Court below but that does not estop the defendant from taking it in this Court. *Riversdale Divisional Council v. Pienaar* (3 Juta, 252). If the Magistrate found the lease to be valid his judgment would be void. This action is in effect an attempt to obtain, by means of an action for damages, an order for specific performance which is beyond the Magistrate's power. To say that the defendant is to be subject to repeated actions for damages is tantamount to ordering him to give possession. Therefore at the most all the plaintiff can now obtain is an order that the Resident Magistrate had no jurisdiction.

But could the Magistrate give judgment for the defendant? He could if there was sufficient on the record to enable him to do so without deciding the validity of the lease. The Magistrate found as a fact that it was in consequence of the plaintiff's own act that the defendant took possession, and therefore he very rightly said to the plaintiff, "You have by your own act caused the defendant to take possession and therefore you cannot claim damages, any loss you have suffered is due to your own voluntary act." This the Magistrate could have said without deciding the validity of the lease or the right of occupying the coffee stall in future.

True the Magistrate says in his reasons that he considered the plaintiff's act amounted to a cancellation of the contract, and if he had made this a part of his judgment it would be to that extent void. But he has not incorporated this in his judgment, his reasons are given merely for the assistance of the Court, but they do not form part of his judgment, and if the judgment is correct the Court will not reverse it because the reasons are not properly stated.

The judgment is that plaintiff is not entitled to damages for being kept out of occupation from 5th August to 9th August. The judgment does not and cannot say who is to occupy in future. If plaintiff claims that his lease is still valid—if he seeks specific performance, let him bring his action in the proper forum. It is still open to him to do so. The present judgment is only *res judicata* in so far as the damage suffered between 5th and 9th August is concerned. *Bertram v. Wood* (3 Sheil, 167).

In any case the damages claimed are excessive.

Mr. Graham in reply.

De Villiers, C.J.: No exception was taken to the jurisdiction of the Resident Magistrate. The amount claimed was only £20, and *prima facie* he had jurisdiction to decide upon the claim. His jurisdiction would, however, have been ousted if there had been a *bona-fide* defence denying the existence of the lease, because such a defence if good, would have had the effect of extinguishing the plaintiff's claim and would have involved the decision of a question beyond the Magistrate's jurisdiction. *Bertram v. Wood* (10 Juta, 177). But no such defence was raised, the validity of the lease was admitted and the plea was that by an oral agreement the lease was cancelled. In setting up this plea the defendant raised no objection to the Magistrate's jurisdiction and therefore, unless this Court is satisfied that it was at all events a *bona-fide* defence, the objection should not be allowed here. What are the facts of this case? The plaintiff hired from the defendant a coffee stall on a six months' lease, which was in writing, at a rental payable weekly. At the end of the first week the plaintiff went to the defendant's house and paid the week's rent. In the course of a conversation the defendant casually observed that the coffee stall had not been as well kept as in his own time, upon which according to the defendant's version, which the plaintiff wholly denies, the plaintiff said, in effect, that the defendant had better take the stall back. There is nothing to show that the defendant accepted this offer if ever it was really made. The plaintiff returned to his stall, somewhat leisurely it would appear, for on his arrival there he found that the boy whom he had left in charge had been turned out and that the defendant was in occupation himself. The boy's evidence is to the effect that the defendant told him to go as he (the defendant) was the master of the place. The plaintiff immediately had a lawyer's letter written to the defendant demanding damages for the illegal eviction. In my opinion there was no cancellation of the lease and no ground

for believing that the plaintiff intended to put an end to the lease. A hasty remark such as that made by him could not have been honestly considered by the defendant as intended to have that effect. The defendant ought at least to have shown that he took the plaintiff at his word by replying that he was willing to take back the premises. If this had been done it is quite clear that no agreement to cancel the lease would have been arrived at. An agreement of that kind should be proved as clearly as an agreement to enter into a lease. It being obvious that the defendant could not have honestly believed that the lease was intended to be cancelled, I am of opinion that the defence raised was not a *bona-fide* one, and that therefore the objection now for the first time taken to the jurisdiction cannot be sustained. The plaintiff is entitled to some damages, and the only question which remains is what should be the measure of damages. A lessee who has been wrongfully evicted is entitled to be reinstated and to obtain such damages as he has already sustained by reason of such eviction. He may, however, relinquish his right to specific performance and sue for damages in respect of the loss sustained and to be sustained during the full stipulated term of the lease. This may, under certain circumstances, be the only remedy available, as for instance where the lessor has let land belonging to another which he had no right to let. (See *Voet*, 19, 2, 17 and 18.) It is the remedy which the plaintiff has elected to pursue in the present case, and indeed, suing as he did in the Magistrate's Court, it was the only remedy which he could avail himself of. Unfortunately for him, the evidence of damage is most meagre. The only proof of loss is that during the week he was in occupation he made a profit of £4. There is nothing to show the probability of the business continuing to be profitable during the remainder of the term, or that the plaintiff will be unable to carry on an equally profitable business elsewhere. The only tangible evidence is that for a week the plaintiff has been unable to carry on his business, and that while he was in occupation of the premises he made a profit of £4 for the week. Upon such inconclusive evidence the Court would not be justified in awarding prospective damages. Judgment must be entered for the plaintiff for £4 as damages, with costs in this Court and in the Court below.

[Appellant's Attorney, D. Tennant, jun; Respondent's Attorney, John Ayliff.]

BEEDLE AND CO., LIMITED, IN { 1895.
LIQUIDATION V. BOWLEY. } Nov. 8th.

Magistrate's jurisdiction—Construction of Statute—Forum of defendant—"Residing."

In construing the words of a Statute it must be assumed that the Legislature used them in their popular sense unless they have acquired a different technical meaning in legal nomenclature, or unless the context or the subject matter clearly shows that they were intended to be used in a different sense. Under the Magistrate's Court Act any Resident Magistrate has jurisdiction in all civil cases brought against any person "residing" within the district of such Magistrate.

Held, that the Resident Magistrate of the district in which the defendant carried on his business as a merchant properly sustained the objection to his jurisdiction on proof that the defendant's place of abode was in another district.

This was an appeal from a decision of the Resident Magistrate of Cape Town in an action tried on the 20th August last, in which the present appellants, the liquidators of Beedle & Co. (Limited), sued the respondent, the defendant in the Court below, for £10, being calls due in respect of certain ten shares in the firm of Beedle & Co. (Limited), of Cape Town, which, as the summons alleged, the defendant in the month of September, 1893, agreed and undertook to take and pay for. The calls in question being duly made and notified to the defendant, which he neglects and refuses to pay.

The defendant excepted to the jurisdiction on the ground that he resided in the district of Wynberg.

Evidence was then taken on the exception, and it was proved that the defendant had been living at Mowbray since the 1st February last, but that he carried on business in Longmarket-street, Cape Town, and that he was registered as a voter in the Municipality.

There was evidence to show that on the 23rd July last the defendant was sued for the same amount in the Magistrate's Court, Cape Town, when the same exception was taken and sustained.

No plea of *res judicata* was, however, filed in the second action.

The Magistrate sustained the exception with costs, on the grounds that the defendant resided

in the district of Wynberg, and consequently beyond the jurisdiction of his Court.

From this judgment the plaintiffs now appealed.

Mr. Graham was heard in support of the appeal.

He cited the following authorities: *In re Bowie* (16 Ch. Div., 486); *In re Williams* (16 Ch. App., 692); *Ablett v. Basham* (5 E. & B., 1019); *Yardley v. Jones* (4 Dow, 45); *Blackwell v. England* (8 E. & B., 541); *Whithorn v. Thomas* (7 M. & G., 1); *Naef v. Mutter* (31 L.L. & O.P., 359); *The King v. Inhabitants of North Curry* (4 B. & C., 953); *Astley v. Earl of Essex* (18 L.R. Eq., 295); *Warner v. Moir* (25 Ch. Div., 605); *Walcot v. Botfield* (Kay, 534); *Jarman on Wills* (Vol. II., p. 901).

Mr. Sheil, for the respondent: The cases cited have no application, as they mainly refer to English Statutes involving questions of franchise or rates. The point at issue has been decided in this Court in *Currey v. Jessop** (not reported).

Mr. Graham, in reply: *Currey v. Jessop* cannot be regarded as an authority against the appellant, as Currey was a Civil Servant and merely came to his office every day, whereas the respondent carries on business in Cape Town.

The Court dismissed the appeal.

De Villiers, C.J.: In construing the words of a Statute it must be assumed that the Legislature used them in their popular sense unless they have acquired a different technical meaning in legal nomenclature or unless the context or the subject matter clearly shows that they were intended to be used in a different sense. The 8th section of the Magistrate's Court Act confers on every Resident Magistrate jurisdiction "in all civil cases brought against any person *residing* within the district for which such Magistrate shall have been appointed." It is not alleged that the term "residing" has acquired the general technical meaning of having a place of business. When applied to a corporation or a company the word would no doubt have this technical meaning for the

* *Currey v. Jessop* (heard on appeal 17th June, 1863).

Jessop sued Currey in the Resident Magistrate's Court, Cape Town, for £8, being an amount due for oats and other articles supplied. The defendant admitted the debt and tendered £8 but refused to pay the costs. The tender not being accepted, Currey excepted to the Magistrate's jurisdiction on the ground that he did not *reside* in the district of Cape Town. The Magistrate overruled the exception and gave judgment in favour of the plaintiff for the amount claimed with costs.

Currey appealed and the Magistrate's judgment on the exception was overruled. R.R.P.

simple reason that the ordinary and popular meaning would be wholly inapplicable. When it is said of an individual that he resides at a place it is obviously meant that it is his house, his place of abode, the place where he generally sleeps after the work of the day is done. This clearly is the meaning which in the vast majority of cases the word, as used in the Act, must necessarily have. It is the meaning also which this Court held, in the case of *Jessop v. Currey*, to have been intended by the Legislature. It is contended, however, for the plaintiff that the case does not apply, because the defendant was a Civil Servant and not, as in the present case, a merchant carrying on business in Cape Town. Let us consider then whether the context or the subject matter with which the section deals requires the wide construction which the plaintiff contends for. The context does not assist the Court in construing the word. As to the subject matter, the Legislature simply gave effect to the ordinary practice that a defendant must be sued in his own forum and, in defining the Magistrate's Court in which he shall be sued, enacted that it must be the Court of the district in which he resides. It is for the defendant's convenience that he shall be sued in his own forum, and if the Legislature had intended that such forum should be the Court of the district in which he carries on his business as well as the Court of the district in which he has his place of abode, it would have done, as the English Act relating to County Courts has done, by expressly so enacting. In the present case the defendant resided in the district of Wynberg and the Magistrate of Cape Town properly held that he had no jurisdiction. The appeal must therefore be dismissed with costs.

[Appellant's Attorney, D. Tennant, jun.; Respondent's Attorney, John Ayliiff.]

DE VILLIERS V. DEYZEL. } 1895.
Nov. 12th.

Stale demand—Satisfactory evidence of non-payment of debt.

In cases of stale demand the Court will require clear evidence of the non-payment of the debt in respect of which the demand is made.

Where therefore such evidence was forthcoming, the mere fact that the summons had only been issued a few days before the period of prescription would have expired, held not to be a bar to the plaintiff's succeeding.

This was an appeal from a decision of the Resident Magistrate of Willowmore in an action

heard on the 8th August last, in which the present appellant, plaintiff in the Court below, sued the respondent, defendant, for £27, with interest from 12th August, 1887, at 8 per cent. per annum; being the price of two horses sold by public auction to the defendant by the plaintiff on the 12th August, 1887.

The defendant denied the debt.

The material facts are as follows: On the date above mentioned the plaintiff, who is an auctioneer and general agent, carrying on business in Uitenhage, held a sale in the estate of the defendant's mother. At this sale property, other than that belonging to the estate, was sold on account of one Cadel, amongst it being the two horses, the subject of the present action, which were bought by the defendant, together with property belonging to the estate and valued at £21 9s. The defendant's father, who was his wife's executor, handed over the management of the estate to the plaintiff, and the latter and the executor arrived at a settlement in March, 1888 or 1889, but according to the plaintiff's evidence, Deyzel, sen., refused to allow the price of the horses to be deducted from the amount of the inheritance coming to the defendant.

No demand was however made on the defendant until 30th August, 1891, on which date, according to the plaintiff, he sent the defendant a reminder by letter. The defendant denied that he had received this letter, and stated in his evidence that although he had frequently met the plaintiff after the sale and after the settlement with his father no reference whatever was made by him to the £27, and that the first intimation he had of it was in the letter of demand, which preceded the issue of summons.

No receipt for the purchase price of the horses was produced, but the defendant stated that he had been informed by his father that the amount had been paid.

He admitted, however, that he was not certain that his father had paid the £27. He further alleged that his entire inheritance amounted to £165, and that his father had paid him about £135, being the balance due to him after deductions. The defendant's father was not however called as a witness at the trial.

The plaintiff's explanation for allowing such a long time to elapse without seeking to recover the debt was that the matter had been overlooked.

The Magistrate gave judgment for the defendant with costs, holding that the sale was held subject to certain conditions, of which, however, there was no evidence whatever.

The plaintiff now appealed,

Mr. Juta, Q.C., was heard in support of the appeal.

Mr. Sheil for the respondent.

The Court allowed the appeal.

The Chief Justice said: The plaintiff was the auctioneer employed by two parties, by the estate and by Cadel. As to the sales from the estate, it was arranged that whatever the heirs might purchase would be deducted from the amount of their inheritance. But the plaintiff denies that any such agreement was made in regard to the other sales. Now when it came to a settlement in 1889 the plaintiff would have had no right to deduct the amount of Cadel's sale from the amount of the defendant's inheritance. What he did was to deduct the amount of the sales in the estate from the inheritance coming to the defendant. The plaintiff swears positively that he never received the money for the horses, and his books show that he has been settled with for the goods sold in the estate, but not for the goods sold by him as auctioneer for Cadel. Well, if the plaintiff's evidence had stood alone, it might have been said, as has been contended by Mr. Sheil, that in a case of this kind where a stale demand is set up, there should be clear evidence that the debt has not been paid. I quite agree with that view, but at the same time the Legislature has fixed eight years as the period of prescription, and the Court cannot shorten that period. The Court might scrutinise more closely a stale demand, but if the debt is proved, the Court must give judgment for the amount. Well, in this case the defendant has supplemented the evidence for the plaintiff; he says his inheritance was £160, and that he has received £135. Well, if he has received £135, it is quite clear the £27, the amount of the purchase price of the horses, could not have been deducted as well as the £21; and after that I do not see what difficulty the Magistrate had; but the Magistrate seems to have been influenced somewhat by what he supposed to be the conditions of sale. He supposed the conditions of sale were necessarily that the amount of all the sales should be deducted, including the sale of Cadel's property. The Magistrate set forth a number of conditions of sale, but there is nothing to show that such conditions were read at the sale nor were they produced in evidence. Under these circumstances, I think the plaintiff, although the demand is somewhat stale, has proved it, and the defendant has done nothing to disprove it. I am reminded also that an important witness for the defendant was his father, and that he might have had interrogatories put to him at the Paarl. The father might then have proved that the money had been paid. But

nothing of the kind has been done. Something was said about a letter from the father, but that evidence the Magistrate ought not to have admitted. It was clearly illegal. The appeal must be allowed, and judgment entered for the plaintiff with costs in this Court and in the Court below.

[Appellant's Attorneys, Messrs. J. & H. Reid & Nephew; Respondent's Attorneys, Messrs. Van Zyl & Buissinné.]

HARRIS V. DE WAAL. { 1895.
Nov. 12th.

Lessor and lessee—Nuisance—Authority—
Barring appeal—Reasonable time—Notice.

A lessor is not liable at the suit of a third party for a nuisance committed upon the leased premises without proof of authority, express or implied, having been given to the lessee to do the acts complained of.

An application to bar an appeal on the ground of unreasonable delay can only be made after due notice in writing to the appellant, in order to give him an opportunity of explaining the cause of the delay.

This was an appeal from a decision of the Assistant Resident Magistrate of Cape Town in an action heard on the 11th February last in which the present appellant, plaintiff in the Court below, sued the respondent, the defendant, for £20 damages.

The summons alleged that the plaintiff was the owner and occupier of the house No 76, Wale-street, Cape Town, and the defendant the owner of the house No. 78, in the same street.

That the house No. 78 was let to certain tenants, who now occupied the same as such under the defendant.

That during the months of September and October, 1894, such tenants as aforesaid, by themselves and those visiting or remaining in the said house No. 78, by their permission and invitation, by congregating in large numbers, and by drinking, shouting, screaming, and playing instruments, disturbed the quiet and peace-enjoyment of the house No. 76, Wale-street, occupied by the plaintiff.

That the plaintiff gave the defendant due notice of these disturbances in November, 1894, and asked him to abate the same.

That the defendant refused and neglected to interfere when requested, and that the nuisances hereinbefore complained of have continued incessantly up till the present day.

The plaintiff alleged that he had sustained

\$20 damages, which sum he claimed with costs of suit.

The defendant pleaded the general issue.

The plaintiff's evidence went to show that from the previous September, until the date of the summons (5th January, 1895), he and his wife, who had been ill during this period, were very much annoyed and disturbed by Kafirs and coloured women of doubtful reputation, congregating at night in the house No. 78, where they drank, danced, made noise, and otherwise created a nuisance. That he had been to see the defendant more than once and complained of the nuisance, but that the defendant referred him to the Resident Magistrate's Court. He admitted that he had sustained no damage through the nuisance, and that the people complained of were in possession of the house when the defendant bought it, and when he (plaintiff) took occupation of his house, which is next door to the house complained of.

He stated in cross-examination that his object in bringing the action was to have the tenants turned out.

There was further evidence in support of the plaintiff's case, which went to show that the house complained of was practically a brothel, and was frequented by women who solicited men as they passed.

The defendant's evidence was to the effect that some eight months previous to the hearing of the summons the plaintiff came to him and complained of the tenants, and that he advised Harris to go and complain to the Magistrate.

He denied that he had any knowledge that the house was used as a brothel, or that he would allow any of his houses to be used for such a purpose. He swore that the house was well conducted, that he had often been to see it, and that he found the tenants well behaved.

The Assistant Resident Magistrate granted absolution from the instance with costs.

The plaintiff now appealed.

Mr. Graham, in support of the appeal: It is submitted that there was clear evidence as to the existence of the nuisance. The respondent having pleaded the general issue in the Court below cannot now take up the position that the tenants should have been sued. In defending the action on the merits he practically approved of the conduct of his tenants and should be held liable. *Bock v. Schroeder and Land* (12 C.L.J., 129; 9 E.D.C., 106). See generally on the subject of nuisances, *Scott v. Holland* (2 E.D.C., 307).

Mr. Sheil, for the respondent: Three questions have to be considered in this appeal:

1st. Was the appeal duly prosecuted within

the spirit of the 33rd Rule, Schedule "B," Act 20 of 1856, and *Rymer v. Solomon* (2 Sheil, 350)?

2nd. Was there any proof given in the Court below as to the existence of a nuisance, and if there was.

3rd. Was the complainant's remedy against the landlord or against the tenants?

As to the first point. The case was heard on the 17th February last, the Supreme Court being then in term, yet the appeal was not prosecuted until now in the last term of the year. Clearly this is not within the spirit of the judgment in *Rymer v. Solomon*. Appeals from Circuit Courts must be prosecuted within three months from the date of judgment (Act 5 of 1879, section 12), and some limit should be fixed, after which appeals from Resident Magistrate's Courts cannot be prosecuted.

[The Chief Justice: It is too late to take this objection now. Notice should have been given to the appellant that application would be made to bar him from proceeding with his appeal. If this had been done the appellant might have filed an affidavit and shown good reason for not having prosecuted the appeal earlier.]

As to the second point. The Court below found as a fact that no nuisance had been committed and there was ample justification for that finding. Not a single respectable householder was called on behalf of the complainant to support his evidence as to the existence of the nuisance. The only witnesses called were Hendricks, the complainant's servant, a man of very doubtful reputation, and the witness Fredericks, neither of whom the Resident Magistrate believed. But even if there were proof of a nuisance the complainant clearly mistook his remedy. If the evidence of the complainant and his witnesses be correct, the house No. 78, Wale-street, was nothing but a brothel and the occupants should have been prosecuted under the common law, as was done in the case of the *Queen v. Paulse and Abrahams* (2 Sheil, 306). If however the occupants did not keep a brothel but committed a nuisance by singing and shouting, they should have been prosecuted under the Police Offences Act, but it could never be held that a landlord was liable in damages for a nuisance not arising from the physical conditions of the premises let but from the user to which the premises were put. See *Rich v. Basterfield* (4 C.B., 783), and *Clerk and Lindsell on Torts* (pp. 325-326) and cases cited there. In the cases on nuisances decided in our Courts such as *Holland v. Scott* (2 E.D.C., 307); *Du Toit v. De Bot* (2 Juta, 213); *Bock v. Schroeder and Land* (12 C.L.J.

129); the occupier of the premises was sued. In the last case the landlord was held equally liable with the tenant on the grounds, *inter alia* that he approved of, and supported his tenant in what he had done. But that case was an entirely different one from the present, as it is not suggested that De Waal approved of or supported his tenants in their conduct.

Mr. Graham in reply cited *White v. Jameson* (L.R., 18, Eq., 303).

De Villiers, C.J.: An objection has been taken by the defendant that the appeal is too late, but the objection itself is taken too late. The objecting party should not wait till the day of hearing the appeal and then raise his objection orally, but he should give due notice in writing to the opposite party of his intention to move the Court to bar the appeal. Such a course would give the appellant an opportunity of explaining the reason of the delay by affidavit, an opportunity which has not been given to the appellant in the present case. In the cases deciding that an appeal will be barred if not prosecuted within a reasonable time the Court did not intend to prevent the appellant from explaining the reason of the delay. Coming, however, to the merits of this appeal I am of opinion that the Magistrate's decision ought not to be disturbed. The action is brought against the lessor of the premises by a neighbouring owner for a nuisance alleged to have been committed by the lessee upon the premises. Cases may be conceived in which the lessor may be liable for the acts of his tenant, but they can only be cases in which authority, express or implied, has been given by the lessor to his tenant to do the acts complained of. The lessor tacitly authorises his tenant to do all lawful acts upon the premises within the scope of the lease, but there is nothing in the ordinary contract of lease which confers any authority on the lessee to become a nuisance to his neighbours. If a landlord were to let his premises with knowledge that his tenant intended to use them as a brothel, there would be some evidence of authority so to use them. Or if after the premises had been let the tenant were convicted of keeping them in such a condition as to be a nuisance to others, or if the fact were otherwise brought to the notice of the landlord, his continued acceptance of rent might even be evidence of authority on his part, but there is a total absence of any such evidence in the present case. According to the plaintiff's evidence acts, exposing the tenant to criminal prosecution were continually committed by the tenant, and yet the criminal law was never set in motion to punish the tenant. Once the landlord was informed of the nuisance, but on

inquiry be failed to verify the information. For the reasons which I have stated the appeal must be dismissed with costs.

[Appellant's Attorney, D. Tennant, jun.
Respondent's Attorney, John Ayliff.]

RANIER V. LE GRANGE.

Mr. Graham intimated that the parties had arrived at a settlement, and prayed for judgment accordingly in the following terms: The defendant to deliver the machinery sued for by the plaintiff, defendant to pay plaintiff the sum of £50, and the plaintiff's costs and expenses as a witness.

The Court gave judgment as prayed.

Before adjourning, the Chief Justice remarked that the next trial case was set down for the 20th instant. He trusted that cases would not be crowded into the last week of term.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

COLONIAL GOVERNMENT V. WEHR.

Mr. Giddy moved for the final adjudication of the defendant's estate.

Order granted.

TRUSTEES DIOCESE V. ENGELBRECHT.

Mr. Maskew applied for provisional sentence on a mortgage bond for £275, with interest at 6 per cent. from October, 1885.

Granted.

ILLIQUID ROLL.

STANDARD BANK V WRIGHT.

Consent was filed, and on the application of Mr. Stoney, judgment was granted accordingly.

BICCARD'S TRUSTEES V. VISAGIE. { 1895.
Nov. 14th.

Double costs—Notice—Insolvent Ordinance, section 82.

Double costs refused against a debtor at the suit of the trustee of an insolvent estate in the absence of any prayer for such costs either in the summons or in the declaration.

Application for judgment under Rule 319 for the sum of £59 15s. 6d., with double costs in terms of section 82 of the Insolvent Ordinance. Double costs had not been prayed for either in the summons or in the declaration.

Mr. Molteno moved.

De Villiers, C.J.: Double costs are allowed by way of penalty against persons neglecting to pay the debts which they owe to insolvent estates, but only if they do not show cause to the satisfaction of the Court for their neglect or refusal. If the summons or declaration does not pray for double costs the debtors may surely assume that the penalty will not be asked for at the hearing or trial. If the defendant in the present case had known that the penalty was to be exacted he might have been able to satisfy the Court as to the cause of his neglect, but no opportunity of doing so was given to him. In my opinion due notice should be given to a debtor before the penalty is sought to be enforced. Judgment will be given for the amount prayed, but with ordinary costs.

[Plaintiff's Attorney, P. M. Brink.]

REHABILITATIONS.

Ex parte JACOBUS JOHANNES BASSON.

Mr. Graham moved for the discharge of the insolvent.

Granted.

Ex parte CORNELIS DIRKSEN.

Mr. Close moved for the insolvent's rehabilitation.

Granted.

GENERAL MOTIONS.

Ex parte MINTO. } 1895.
Nov. 14th.

Married woman—Marital power—Transfer of land.

The Court authorised a woman married by contract, the marital power not being excluded, to pass transfer of land registered in her name to a purchaser, her husband's whereabouts being unknown.

This was an application by Mrs. Elizabeth A. Minto, who was married by ante-nuptial contract to her present husband, the marital power not having been excluded.

On 14th February, 1891. the petitioner's

K 3

husband deserted her, and beyond hearing from him shortly afterwards from the Orange River Station, she had since received no information as to his whereabouts, although she had done her best to ascertain the same.

In the early part of this year the petitioner purchased certain landed property in Woodstock, and on the 28th March last, the Court allowed her to pass a mortgage bond for the balance of the purchase price unassisted by her husband.

She now alleged that since the date of her last petition to the Court, she had received no information as to her husband's whereabouts.

That she had sold a portion of the property which she had bought at Woodstock, but that she could not convey it to the purchaser without the formal assistance of her husband.

She therefore asked for an order authorising her to pass transfer of the property to the purchaser without the assistance to her husband.

Mr. Sheil appeared for the petitioner.

The Court granted the order as prayed.

[Petitioner's Attorney, C. C. Silberbauer.]

Ex parte SMITH. } 1895.
Nov. 14th.

Servant—Bank in liquidation—Gratuity.

The Court authorised the liquidators of a bank to pay a gratuity of £100 to an old and faithful servant who had lost his situation in consequence of the bank's failure.

Petition of Henry Smith, who had been in the service of the Union Bank for thirty years as messenger and caretaker.

The petitioner alleged that shareholders or contributories representing 1,077 out of a total of 1,432 shares had recommended that he should receive £100 for his long and faithful services.

A consent paper signed by 1,077 shareholders was annexed to the petition.

The prayer was that the Court might authorise the liquidators to pay the petitioner the sum of £100.

Mr. Sheil was heard in support of the application.

The liquidators had had notice of the application but they did not appear.

The Court granted the order as prayed.

[Petitioner's Attorneys, Messrs. Reitz & Herold.]

Ex parte RAKIEP AND OTHERS. { 1895.
Nov. 14th.
Dec. 17th.

Trustees—Decease—Election of new trustees
—Confirmation.

Where certain buildings and land had been transferred to trustees, in trust for a Malay Congregation, to be converted into a mosque, and the trustees had died, the Court confirmed the appointment of new trustees elected by the congregation.

The Court refused to authorise the trustees to mortgage a portion of the land for the purpose of erecting new buildings, &c., there being a condition in the instrument creating the trust which imposed a restraint upon alienation except for certain specified purposes.

This was the petition of Abdol Rakiep and others, members of a Malay congregation formerly worshipping under the priesthood of one Abdol Roof.

The petition set forth that on the 27th February, 1844, there was transferred to Baderoen and certain others in trust for the petitioners' congregation a certain house and premises to be converted in a mosque.

That all the trustees named in the deed of transfer were dead.

That at a meeting of the congregation held on the 25th September, 1895, it was resolved by the unanimous vote of those present that Hadje Imaum Rakiep, Imaum Abdulla, and Imaum Mahomet be appointed trustees of the property in lieu of those mentioned in the deed of transfer. That the resolution had since been agreed to by all the members of the congregation who were not present at the meeting. (Copy of the resolution was annexed.)

That it was desirable that the persons so elected as trustees should be appointed by the Court to be such trustees and that provision should be made for regulating any future appointments of trustees.

The prayer was that Hadje Imaum Rakiep, Abdulla, and Mahomet might be appointed trustees, and that the Court would be pleased to direct in what manner appointments should in the future be made of trustees of the property.

Mr. Graham in support of the application, cited Act 3 of 1873, section 6.

The Court confirmed the appointment of the elected trustees and directed that the future trustees should be the priests for the time being of the congregation.

A second petition was presented from the same applicants asking for leave to mortgage for the sum of £500 a certain piece of vacant and unproductive land attached to the mosque premises for the purpose of erecting buildings on it.

The entire property was transferred to the original trustee subject to the condition that they should hold the same without power to transfer, cede, or mortgage the same save for the due payment of the purchase money thereof.

This condition was, the petitioners alleged, imposed solely by, and at the request of the then members of the congregation, and not by any other person or persons. At the meeting at which the trustees were elected a resolution in favour of mortgaging the property was passed by those present and was approved of by the other members of the congregation who were not then present.

The trustees now sought the required authority from the Court.

The application was refused.

The Chief Justice said: The founders of this church seem to have had some good reason for prohibiting any alienation or mortgage of this property, and I do not think good cause has now been shown for setting aside that prohibition. Only fifteen members of the congregation ask for this, but I presume there must be more members of the congregation than fifteen. If there are only fifteen I do not see what they are going to do with this money, the income from the building to be erected, except to divide it amongst themselves. At all events, I do not think sufficient cause has been shown for authorising this mortgage.

Afterwards on the 17th December the application was renewed. In this latter application it was pointed out that the roof of the mosque was badly in want of repair, that the construction of a double storied-building had actually been begun, the lower part of which could be let as a shop, which would bring in a rental of £75 a year, the upper part to be occupied by the chief Imaum of the congregation.

The petitioners further alleged that they were not aware of the condition imposing a restraint upon alienation when the building was begun.

They explained the absence of any reference in the first application to the condition of the roof or to the new building, in consequence of their not having anticipated that the Court would inquire into the objects to which the money proposed to be raised would be devoted, and therefore they had not fully instructed their attorney on the subject. A Malay, who claimed to be one of the original members of

the congregation, was present in court during the hearing of the second application. He was called as a witness by the Court, and strongly opposed the application on the grounds that it was contrary to the teaching of the Koran to mortgage property, which like that in question, was dedicated to the uses of a mosque. He further stated that all the applicants' congregation, two only excepted, were either members of his family or connections of his by marriage.

The application was refused.

The Chief Justice said: There is no reason for withdrawing the refusal made on the first application. There is no fresh fact before the Court which would justify us in granting the authority asked for. The grant expressly prohibits any alienation. On the last occasion, it was said that it would be necessary to alienate because the land was lying waste, and some revenue might be raised by erecting buildings for the purpose of letting them. Now, after the Court has refused the application on those grounds, it is stated that the roof of the church wants repairing, and that schools are to be erected. Well, as to the roof, I think the congregation can do what other congregations do—repair it themselves. They are most of them artisans, and can do it for themselves. There is no necessity on that account to raise money on mortgage. As for the schools, they have educated their people hitherto without fresh buildings, and so small a congregation will not require very large or expensive schools. It is quite a family affair as far as I can see, and I do not think the Court should grant the application.

Mr. Justice Buchanan concurred.

[Petitioner's Attorney, W. E. Moore.]

IN THE ESTATE OF THE LATE JOHANNES J. HUMAN.

Mr. Graham applied for an order making absolute the rule *nisi* for authority to the Registrar of Deeds to transfer to Petrus G. Human and others certain portions of the farms Doorn Vlakte and Grand Vlakte, in the district of Alexandria, without the production to him of any act of repudiation of rights of purchase possessed by sons of the said Human. The order was granted.

MASKEW'S EXECUTORS V. TRUTER AND ANOTHER.

Mr. Innes, Q.C., applied for an order making absolute the rule *nisi* for an interdict

restraining the respondents from entering upon, ploughing up, or otherwise exercising any right of ownership over any portion of the farm Blakkley Plaats, in the district of Van Rhyndorp, on the eastern side of the present bed of the Oliphant's River, pending an action for trespass and a permanent interdict.

The order was granted.

IN THE INSOLVENT ESTATE OF JOHANNES J. COMBRINCK.

Mr. Molteno moved for an order authorising the Master of the Supreme Court to call a meeting of creditors of the said insolvent estate for the purpose of electing a new trustee in the room of the late Barend Wethmar.

The order was granted.

GRUNDLING'S EXECUTORS V. LATEGAN AND OTHERS.

Mr. Searle, Q.C., moved for authority to the Taxing Officer to tax certain agents' charges incurred in the suit between the parties, it having been the intention to include the charges in question when judgment was signed in terms of the consent paper filed.

The Chief Justice said: The respondents' suggestion may be adopted with the qualification that the Taxing Officer is not to allow Mr. Cairncross any charges for work which it was his duty as executor to do. With that qualification the order will be made.

WILTSHIRE V. WILTSHIRE.

Mr. Graham moved for leave to petitioner to sue her husband by edictal citation in an action for restitution of conjugal rights by reason of his malicious desertion.

The order was granted.

KENNEDY V. MAREE. { 1895. Nov. 14th.

Application for the appointment of a *curator ad litem* in proceedings about to be instituted to have the respondent, Caroline Maree, at present an inmate of the Old Somerset Hospital, declared incapable of managing her affairs.

The application was made by the adopted daughter of the respondent who was alleged to have no relatives.

Mr. McLachlan moved.

The Chief Justice said: Under the special circumstances in this case the Court will entertain the application, for it appears that this old lady has no relatives, and the present petitioner has lived with her and her husband since she

The right of a debtor to appropriate does not apply to any debt which he proposed to pay in part but which the creditor is entitled, under the instrument of debt, to receive only in full.

RANDALL V. GRAY.

This was an application under the 50th section of the Charter of Justice for leave to the plaintiffs to appeal to Her Majesty in her Privy Council from the judgment of the Supreme Court, delivered on the 5th instant, awarding the plaintiffs £1,000 for salvage services.

Mr. Sheil (with him Mr. Close) consented.

This was an application on notice by Mrs. A. M. Brink, in her capacity as trustee for the minors Keytel, requiring the respondents to show cause why the liquidation account and plan of distribution of the proceeds of the balance of purchase money of the landed property sold in execution in the matter between the Estate of the late Arthur Woodward Fletcher, plaintiff, and Christina Johanna Smuts, defendant, should not be rectified in accordance with the objections set forth in the applicant's affidavit, and why they should not pay the costs of the application.

BRINK, N.O. V. THE HIGH SHERIFF
AND FLETCHER'S EXECUTORS. { 1895.
Nov. 14th.
„ 20th.

That on the 2nd September, 1895, the Sheriff framed a liquidation account and plan of distribution of the proceeds of the first instalment of the purchase money of certain landed property sold in execution in the matter between *Fletcher's Executors v. Smuts*, wherein he made the following award:

AWARD.

Amount due. Awarded.

To plaintiff (1st Bondholder).

28th Sept., 1893 ...£1,250 0 0

Interest, 17th Sept.,
1895, at 5 per cent.,
£123 2s. 4d.

Less £30 paid on ac-
count

Amount of premium,

Policy of Assurance

First bill of costs ...

Second „ „ ...

£1,372 2 6 £381 4 0

That thereafter on the 24th October last he framed a liquidation account and plan of distribution of the proceeds of the balance of the purchase money of the landed property

sold as aforesaid and in such account he made the following award:

AWARD.

To the plaintiff.	Amount due.	Awarded.
Balance from previous account	£990 18 6	
Interest from 18th Sept., 1895, at 5 per cent. ...	6 18 5	£997 16 11
To 2nd Bondholder (the minor children of the defendant)	£1,000 0 0	£218 9 9
		<hr/> £1,216 6 8

Mr. Steytler objected to the award on the following grounds:

(a) Firstly, that preference has been awarded in respect of a sum of £7 4s. 2d., included in the bill of costs for £8 2s. 6d., described in the former of the accounts mentioned as first bill of costs, when no preference therefor is enjoyed by law, being costs incurred by the estate of A. W. Fletcher *prior to the issue of writ*.

(b) That by the method of award interest has been awarded upon items which carry no interest, such as the costs, and compound interest has also been awarded.

(c) That all moneys received should be applied after payment of the costs connected with the sale and writ, firstly in reduction of capital and then of interest.

The Sheriff in his answering affidavit to the above alleged:

That the objections now raised did not apply to the account for the confirmation of which he now asked, as none of the items to which exception was taken appeared in the *final liquidation account*, but were brought up in the first account, to which no objection was made and which was confirmed by the Court on the 18th September, 1895.

That it is the practice of his office to frame accounts in the manner now objected to.

That the costs of obtaining judgment have always been regarded as preferent on the ground that they are absolutely necessary to the realisation of the landed property attached under the writ.

That the proceeds of the first instalment of the purchase money £405, less sundry fees and charges £23 16s., viz., £381 4s., were applied as follows:

Interest	£93 2 4
Amount of premium (Assurance)	3 1 0
First bill of costs	8 2 6
Second " "	17 7 8
	<hr/> £122 2 6
Payment on account of capital ...	259 1 6
	<hr/> £381 4 0

leaving a deficiency of capital £990 18s. 6d., which said deficiency is shown in the first liquidation account, and the Sheriff says therefore that he has not awarded interest to the first bondholder upon items which carry no interest, such as the costs, and that he has not allowed compound interest.

That in the absence of any settled practice to the contrary he has applied the first proceeds to the payment of preferent costs and interest, and the balance to capital in accordance with the method always in vogue in his office.

He therefore prayed that the applicant's objections be not sustained but that the account be confirmed.

Mr. Steytler, in answer to the Sheriff's affidavit, said that he found nothing in the award made in the first account to indicate that the proceeds had been applied in the manner stated by the Sheriff, that in fact the whole claim of the first bondholder was lumped in the account and the balance applied in reduction of it giving no indication of the method of appropriation and therefore making it impossible for him (Steytler) to object to it. In confirmation of which he referred the Court to the account itself.

Further, that such account was merely a first and not a final account and therefore merely an award on account.

That in his opinion it is a settled practice, after payment of expenses of realisation, to apply all available funds towards extinction of capital first and then towards interest.

That he had never known any case, subsequent to 1884, where costs incurred prior to issue of writ had been awarded as preferent unless there had been an express provision in the bond giving them preference.

To the above the Sheriff replied that notice was given to the applicant that the first account was lying for inspection at his office, but that no one appeared on her behalf to inspect the same. That had anyone appeared for the applicant the method of appropriation, if not understood, would have been explained.

With regard to the settled practice referred to by Mr. Steytler, the Sheriff denied that the method indicated was a settled practice, and said that from his experience of accounts in insolvent estates both the mode of framing accounts followed by him and that referred to by Mr. Steytler were constantly pursued.

The Sheriff finally alleged that he had continued the method of framing accounts in the matter of sales of land adopted and pursued by his predecessors in office, and as it was impossible to place the immovable property in his hands for realisation without incurring the

costs to which exception was taken, he had always been of opinion that these costs should be treated as liquidation charges.

Mr. Rose-Innes, Q. C., for the applicant on the question of costs: The Sheriff has awarded the full costs as a preference. It is common cause that costs are not preferent by the bond, therefore they can only be preferent because they are a necessary outlay in connection with the attachment. But such necessary costs would only be the costs of the writ, not the costs of obtaining judgment. The same principle is applied in the Insolvent Ordinance, section 22. In the present case the amount is not large, but the principle is important. See *Re Woods* (3 Menz., 114); *Van Zyl's Judicial Practice* (pp. 198, 204, 549).

Mr. Giddy, for the Sheriff, objected to the applicant's *locus standi* and referred to Rule 121.

Mr. Graham, for the executors, cited Rule 117, section 112, Ordinance 6 of 1843; *Villiers v. Le Riche* (1 Menz., 518); (1 Ros., 326); *Stewart's Assignee v. Walls' Trustee* (3 Juta, 245) and *Steyn's Trustee v. Gous* (11 S.C.R., 348).

Mr. Innes in reply.

Curia ad vult.

Postea (Nov. 20th).

Judgment was delivered, the application being dismissed with costs.

De Villiers, C.J.: In the distribution by the Sheriff of the proceeds of the sale of land in the execution of a judgment, no difficulty arises so long as he has to deal with only the original plaintiff and defendant. Such proceeds are properly applied to the payment of the full amount for which the plaintiff may have obtained judgment, including all the costs awarded, and all the interest, even if it exceeds the interest for the year and the current year. His duty, however, is not quite so simple when, as in the present case, there is a competition among creditors to whom the land has been specially mortgaged. It then becomes his duty strictly to adhere to the rules of priority laid down by law, and to apply only the balance left after payment of all preferent claims on the land to the satisfaction of that part of the plaintiff's judgment debt, which is not entitled to a preference. Among the items which are not entitled to such preference is the interest for a year, and the current year before the property was attached. The rule of the Roman law was that priority for the principal conferred priority for the interest stipulated for, and, according to several Dutch writers, including *Matthæus* (de Auct. 1, 21, 8, and *seq.*), that was also the general rule in the Netherlands. In Amsterdam, how-

ever, the priority in respect of interest was confined to a year and the current year, and this practice was introduced into this colony as far back as the year 1736, if not at the time of the establishment of the Colony. Interest, however, continued to run from the time when the property was placed under attachment, either by virtue of an order of sequestration or under a writ of execution. In the case of *Cloete v. Aling* (2 Menz., 318), decided in 1834, it was held that the holder of a mortgage bond is entitled in preference on the debtor's sequestration, not to full arrears of interest which may be due on the bond, but only to interest for one year in addition to that for the current year. Interest was further allowed as preference from the date of sequestration to the time of payment. This additional allowance was no doubt made under the 40th section of the old Insolvent Ordinance, which is in the same terms as the 33rd section of the existing Insolvent Ordinance, but these Ordinances merely followed the previously existing practice in regard to sales in execution. In the present case the Sheriff has awarded to the plaintiff, as first mortgagee, interest accruing subsequent to the issue of the writ of the execution, as well as for the year and current year prior thereto. Another item in respect of which the mortgagee would have no preference, although included in the amount of his judgment, is any advance made by him after the registration of the bond, unless the bond not only covers such advance, but also expresses a certain sum beyond which future advances shall not be deemed to be covered by the bond. Such was not always the law, for in 1837 it was decided in the case of *In re Carter* (2 Menz., 335), that a bond for uncertain amounts to be advanced in future, and containing a general and special mortgage, is a valid bond, in preference, if duly registered. The hardship which this state of the law entailed on subsequent mortgagees and on creditors in general, induced the Legislature to modify the law by Ordinance No. 27 of that year. I fear that the provisions of this Ordinance are frequently overlooked, for bonds continually come before the Court which purport to cover future advances to be made by the mortgagee, such as payments of premiums of insurance, without including them in the maximum sum to be secured by such bonds. Of course, payments made by the mortgagee, for which the law allows a preference, by reason of their being necessary for the purpose of realising his security, need not be provided for in the bond at all. Among the payments for which such a preference is allowed are the necessary costs which the mortgagee has incurred for the

purpose of making the property executable. According to *Wassenaar* (Pract. Jud., c. 22, section 54), this preference was confined to the costs of the "decreet" and writ of execution, and by the "decreet" was meant the judicial order declaring the property executable. A cumbrous procedure was necessary after judgment, before the "decreet" could be obtained. In this Court a plaintiff can obtain his judgment and subsequent writ of execution with far greater expedition than a plaintiff in a Dutch court could obtain his writ after he had obtained the benefit of a judgment for his debt. The opinion of *Wassenaar* is not shared by other writers whose works I have consulted. *Matthæus* (De Auct., 1, 21, 17), for instance, regards the costs of an action to recover the amount of the debt as accessory to the principal debt, and therefore subject to the same preference as the debt itself. The practice of the Master of the Supreme Court, so long as he was entrusted with the duty of conducting sales of land in execution, and of the Sheriff subsequently, has always been in accordance with that view. In the present case the Sheriff only carried out the existing practice of his office in treating the necessary costs of the action brought by the mortgagees upon their first bond as part of the expenses of realisation, and the objection to the item of costs made by the holder of the second bond must be disallowed. The next objection raised by the second bondholder relates to the interest on the first bond. He does not object to the allowance of interest from the date of judgment to the time of payment, but he contends that such interest should only be allowed on the balance of the bond after deducting the sum awarded to the first mortgagee under the first plan of distribution. The price of sales of land in execution is generally payable in instalments, and it appears to be the practice of the Sheriff to distribute the proceeds as the instalments are paid. For that purpose it often becomes necessary to frame two or more successive plans of distribution. In the first account framed in the present case the balance in hand was devoted, in the first instance, to the payment of the costs already mentioned and the interest for the preceding year and current year, and then to the diminution of the capital sum. The applicant contends that the balance should, in the first instance, have been appropriated to the payment of the capital sum, in which case the interest charged in the subsequent account would have been reduced, inasmuch as interest could not be allowed on interest. No authorities were cited in support of such a mode of appropriation, but

reliance was placed upon the well-known rules relating to the appropriation of payments: "It is for the debtor, and failing him, for the creditor, to indicate at the time of payment to which of more items than one such payment shall be imputed, and it is only on failure of both that the law steps in to make the appropriation."—(*Stiglingh v. French*, 9 Juta, 411.) The right of the debtor to appropriate must, of course, be qualified where the creditor would not be bound to accept payment of the debt to which the former seeks to impute his payment. A creditor, for instance, under an ordinary mortgage bond is not bound to receive part payment of the capital, and therefore it could not be held that the bond debtor who owes interest can compel the creditor to impute any payment to capital instead of interest. But, apart from this difficulty, let it be assumed that the rule would be applicable in the present case. Mr. Innes admits that the debtor did not and could not after execution appropriate the payments as he chose, and that failing appropriation by the debtor and creditor, the rules of law must decide. Now the very first rule mentioned by *Voet* (46, 3, 16) as being applicable in such a case is that if the debtor is in arrear for interest, the payment must first be credited to account of the interest and thereafter of the principal, and his statement of the law is fully supported by the authorities cited by him. According to *Van der Linden* (Book I., chapter 18), the same rule was observed in his time. It is only as between principal debts that the further rule, relied upon on behalf of the applicant, would apply that the payment is to be credited to the account of the debt which is most onerous for the debtor. In the present case the Sheriff, in appropriating the proceeds of the first instalment to the payment of interest before principal, followed the practice which has been invariably observed by his predecessors in office. A different practice has, it seems, been sometimes followed by trustees of insolvent estates and by liquidators of companies, but it has never been sanctioned by any decision of this Court. The objection to the method by which interest has been awarded in the Sheriff's second plan of distribution must also fail. On behalf of the respondents, the Sheriff and the first bondholder, an exception has been taken against the present application on the ground that it comes too late, after the first plan of distribution has been confirmed, and that it ought to have been made before such confirmation and by way of appeal in terms of the 118th Rule of Court. This exception would be perfectly good if it were clear that the first plan was final in its nature and not merely provisional. There is considerable force in the

applicant's contention that the items which he objected to must be considered as provisionally entered and subject to debate in subsequent plans; but the point does not require decision seeing that the Court is against the application on its merits. The application must be refused, with costs.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton; Respondents' Attorneys, Messrs. J. & H. Reid & Nephew.]

SCHULTZ V. STAFANIS. { 1895.
Nov. 20th.

Ejectment—Quitrent title—Trust.

In 1887 the Colonial Government granted under Act 14 of 1878, section 11, a quitrent farm, situated in Emigrant Tembuland, to Bishop J. and his successors in office, in trust, but the objects of the trust were not specified in the grant.

Thereafter in June, 1894, Bishop J. sold the farm to S.

On taking possession of the farm S. found the defendant and a number of other Tembus in occupation of the farm, they having been located there by a Magistrate after the Tembu rebellion, and on their refusal to give up possession, or pay rent in respect of their occupation, he sued the defendant in the Magistrate's Court of the district for ejectment and damages.

The Magistrate gave judgment for the defendant on the grounds that the farm was granted to Bishop J. in trust for the benefit of the defendant and the Tembus generally; that, notwithstanding the sale of the farm to S., the defendant's rights remained unaltered, and that if S. had any remedy it was against Bishop J.

Held, on appeal, reversing the Magistrate's decision, that S. was entitled to a decree of ejectment.

This was an appeal from a decision of the Resident Magistrate of Cofimvaba (Tembuland) in an action in which the present appellant, plaintiff in the Court below, sued the respondent, defendant, for ejectment and damages. The summons alleged:

1. That the plaintiff is a trader and store-keeper, residing at St. Mark's, in the district of Cofimvaba.

2. That the defendant is a native agriculturist,

residing at the Nququ, within the jurisdiction of the said Court of Cofimvaba.

3. The plaintiff, by virtue of a deed of transfer made in his favour, bearing date the 2nd day of June, 1894, became and is the registered owner of lot 18, called the Nququ, situate in the said district aforesaid.

4. The plaintiff, upon taking as he might lawful occupation of the said Lot No. 18, as aforesaid, found the said defendant residing thereon, and immediately apprised him that he (the plaintiff) was the owner thereof, and called upon him (the defendant) to pay a rental for occupying or otherwise to quit the premises.

5. That defendant notwithstanding has refused to pay rent or quit the said premises, or to recognise the plaintiff's rights. Whereupon the plaintiff on the 23rd March, 1895, again gave the defendant notice to quit the said lot 18 on or before the 30th day of June, 1895.

6. That defendant still continues in illegal occupation of the said lot 18 or portion thereof, against the wish, will, and consent of him, the said plaintiff.

The plaintiff claimed as against the defendant: (a) An order of ejectment; (b) £30 damages and costs.

The defendant appeared in person and pleaded:

1. That when the plaintiff obtained the possession of the farm he, with other Tembus, were there in occupation.

2. That the defendant with others have received notice to quit the farm, lot No. 18, Nququ, but that he did not do so, not having been so instructed by the Magistrate and the Tembu Chief Matanzima.

3. That he did, as alleged, receive the notice in the summons referred to.

The plaintiff put in the original grant, and his deed of transfer dated 2nd June, 1894, from which it appeared that the farm was sold to him by the Right Rev. Charles Jolivet, Roman Catholic Bishop.

The grant was made to Bishop Jolivet and his successors in office in trust on the 15th August, 1887, under the 11th section of Act 14 of 1878, at an annual quitrent of £25 a year.

The plaintiff was called on the claim for damages, and proved that the defendant had prevented him from ploughing on the farm, and had driven his servants away.

The defendant's case was that after the Tembu rebellion he was located on the farm by Mr. Levy, and that he did not recognise the plaintiff in the matter. The Magistrate gave judgment for the defendant with costs.

In his reasons he referred to the Tembuland Commission (Final Report, 31st January, 1883, section 22, page 7) as showing the rights which

Bishop Jolivet enjoyed, and the purposes for which the land was granted, viz., to found an industrial school in connection with a Trappist mission at the Nququ amongst the most heathen portion of the people, and held that by the transfer to plaintiff defendant's right remained unaltered.

The Magistrate further expressed the opinion that the plaintiff should look to Bishop Jolivet for redress.

From this judgment the plaintiff now appealed.

Mr. Sheil in support of the appeal.

The Magistrate clearly erred. The plaintiff is the registered owner of the land, and as such he was entitled to exercise all the rights which *dominium* confers.

After acquiring the farm he found the defendant and other Tembus squatting on the land, and as they could show no title by lease or otherwise, and as they refused to pay any rent, but on the contrary by force prevented him from exercising his proprietary rights, he rightly sued them for ejectment and damages, after giving them due notice to quit.

The only defence raised by the defendant was that he had not been instructed by the Magistrate, only the Chief Matanzima, to leave.

Clearly this was no defence in law to the plaintiff's claim.

The Magistrate however appears to have assumed that an express trust, which ran with the land, was constituted by the grant, and he read into the grant the report of the Tembuland Commission. Clearly he had no right to do this. The grant speaks for itself, and if the grant be looked at it will be found that no trust was constituted.

There is no prohibition against alienation in the grant. Natives are not mentioned in it.

No principle in the law of trusts is clearer than that the instrument creating the trust must clearly define the objects of the trust.

[Counsel was stopped by the Court.]

The respondent was not represented.

The Court reversed the Magistrate's judgment, and ordered a decree of ejectment against the defendant, with costs in the Supreme Court and in the Court below.

The Chief Justice said: The apparent desire of the Magistrate in this case was to do substantial justice. He was greatly influenced by the fact that the defendant was in possession of the land long before any grant of it was made to Bishop Jolivet; and he went into possession of the land, according to the Magistrate, in the full belief that he was to remain there as long as he behaved himself. It was, therefore, certainly a great hardship on the defendant that, having been located on this land, he should now be driven away from it, and it is this hardship on

the defendant that influenced the Magistrate in coming to his decision. But neither the Magistrate, nor this Court, can be influenced by feelings of that kind; we must regard the law of the land. Now it appears that Bishop Jolivet has received a full quitrent title to this farm under the Act 14 of 1878; the rights of ownership granted by that Act are as wide as possible. Certain conditions may have been imposed in the grant, but under the 10th section it is provided that no condition not expressed shall be presumed to exist. Bishop Jolivet, therefore, according to the Magistrate's own opinion, was the owner of this land without any conditions so far as affect the present case; without any obligation on him to allow natives located there to remain on the land. He transferred his rights to the plaintiff, and the plaintiff has got the duly registered title of this land and therefore, *prima facie*, he is the man who is entitled to the full possession of the land, and can remove anyone found trespassing upon it. There seems to be no choice for the Court but to grant a decree for the plaintiff. At the same time I would observe that the defendant, if his statement be correct and if the Magistrate's view be correct, seems to have some claim upon the Government to be located elsewhere. It seems to me that the unfortunate defendant has mistaken his course of action; he has got no means to defend his suit; no one to take up his case for him; but if he had been well-advised he would either have requested the Government to locate him elsewhere, or else, if he thought the grant to Bishop Jolivet went beyond what the Act allowed, then he ought to have brought an action to set aside the grant and the subsequent transfer to the plaintiff; but so long as the grant and transfer stand the Court is bound by them. It seems almost a mockery to say that the defendant ought to have brought an action to set aside a grant and transfer of this kind, because he probably would not have the means of doing it; still that is the only legal course open to him if he wishes to show that this grant and subsequent transfer cannot hold good as against his prior occupation. As to damages, I do not think there is sufficient proof, and I do not suppose the defendant would be able to pay any if they were awarded; but I think the plaintiff is entitled to a decree of ejectment against the respondent. The appeal will therefore be allowed, and a decree of ejectment ordered against the defendant, with costs in this Court and in the Court below.

Mr. Justice Upington concurred.

[Appellant's Attorneys, Messrs. J. & H. Reid & Nephew.]

REGINA V. SWART. { 1895.
Nov. 21st.

Theft—False pretences—Conviction.

The accused, being the owner of five goats which were pledged for a debt, obtained goods from the prosecutor on the promise to deliver three of the goats to the prosecutor within eight days.

The goats were not delivered and the accused was charged in the Magistrate's Court with theft by means of false pretences and convicted.

Held, that the conviction was wrong, inasmuch as there was no evidence of any false statement or representation having been made by the accused.

The Chief Justice mentioned this case which came before him on review from the Resident Magistrate of Clanwilliam. The accused was charged with the crime of obtaining certain goods by false pretences. Upon obtaining the goods the accused promised to deliver to the seller three goats within eight days. It afterwards transpired that although the accused had at the time of purchase five goats they were pledged. The accused was found guilty and sentenced to three months with hard labour.

De Villiers, C.J.: The accused in this case was charged before the Resident Magistrate of Clanwilliam with the crime of obtaining goods by means of false pretences. The evidence shows that the goods were obtained from the prosecutor upon a promise that three goats would be delivered to him within eight days. It appears that the accused had five goats, but they were pledged to a third person for a debt. The Magistrate convicted the accused and sentenced him to three months' imprisonment with hard labour. In my opinion the conviction was wrong. The accused was liable to a civil action for not delivering the three goats within the promised time, but he could only be convicted of theft by means of false pretences if he made a false statement at the time of obtaining the goods knowing the same to be false. There is no evidence, direct or indirect, of such a false statement having been made. The utmost that could be said against him is that he represented himself to be the owner of three goats, but this representation was not false. He owned five goats at the time and it is quite consistent with the evidence that he intended to release them within the eight days. His inability to do so does not prove the statement to have been false.

It must be clearly understood, however, that if the accused had obtained the goods by making a false statement of fact he would, according to the established practice of this Court, have been guilty of theft by means of false pretences. Theft, in Roman-Dutch law, is the wrongful taking of any movable property without the consent of the owner with the intention on the part of the taker to appropriate it. If the owner parts with the possession by reason of a false statement he is not deemed to consent to its being either taken or appropriated by the taker. In this respect our law differs from the English law, which seems to hold that, although the owner has been deceived by a false statement, his parting with the goods shows his intention to part with his property in the goods. It is too late to inquire whether the distinction of the English law between larceny and obtaining goods by false pretences ought to be maintained in this colony. The latter offence has always been treated as theft, the charge in the indictment being sometimes "theft" only and sometimes "theft by means of false pretences." The Legislature has also recognised the validity of our practice in the 7th section of Act 3 of 1861.

The conviction and sentence must be quashed.

PROVISIONAL ROLL.

LITHMAN'S TRUSTEE V. GELDERBLUM.

Mr. Close applied for provisional sentence for the sums of £100 and £175 on two bonds, the property of the defendant to be declared executable.

Sentence was granted as prayed.

SCHOEMAN V. HEYNS.

Mr. Tredgold moved for provisional sentence for the sum of £150, due on a mortgage bond, with interest at 8 per cent. from 20th March, 1894.

Sentence was granted as prayed, and property declared executable.

BENNETT V. HALL.

Mr. Watermeyer applied for the final adjudication of the defendant Charles Ernest Hall's estate.

The defendant's mother appeared, and in answer to questions by the Court, said that the defendant was seventeen years of age and was now in Johannesburg. In her opinion he had a good defence to make. Both he and witness were without means. He traded on his own account.

The order was granted as prayed.

BAM'S EXECUTORS V. TOUT.

Mr. Sheil applied for provisional sentence for £57 with interest from 13th September, 1895, due on a dishonoured promissory note, and also for judgment under Rule 329 for £53 2s. 2d., less £35 paid on account.

Provisional sentence and judgment were granted as prayed.

ILLIQUID ROLL.

TOWN COUNCIL V. SOEKER.

Mr. Tredgold applied for judgment for the sum of £23 12s. 6d.

Granted.

KENNEDY V. MAREE. } 1895. Nov. 21st.

Action to have the defendant declared incapable of managing her own affairs and for the appointment of a curator of her property.

Mr. McLachlan for the plaintiff.

Mr. Malan appeared for the defendant as *curator ad litem*.

Alice Kennedy deposed that she was the adopted daughter of Caroline Maree. She was now seventeen years of age and had lived with Mrs. Maree since she was two years old. Mrs. Maree was sent to the Old Somerset Hospital because she (witness) had no means to keep her. She considered Mrs. Maree, who was a very old woman, to be of unsound mind. Mr. Maree, her husband, left two houses and some furniture. Mr. Page took possession of the furniture, and Mr. Steer sold the landed property. She believed Mr. Steer still had £25 remaining of the proceeds. The other money (about £50) he gave to her (witness), and she spent it to support herself.

Cross-examined by Mr. Malan: She believed that certain documents were brought to the hospital at the instance of Mr. Steer, for Mrs. Maree's signature, but she could not say if they were signed.

Dr. Cox, resident surgeon at the New Somerset Hospital, deposed that Mrs. Maree was suffering from mental weakness consequent on old age, and was not capable of managing her own affairs. Mr. Steer came to the hospital and requested her to sign papers, but he (witness) told Steer that she was not fit to sign documents.

The Chief Justice said: It is quite clear that this old lady's affairs require inquiring into. At present I do not understand the case in the least. I do not know on what authority Steer sold this old lady's property and paid £50 of it to the present applicant, Miss Kennedy. It may be all right, but still it requires inquiring into,

and Mr. Steytler, if appointed curator, will do so. The Court cannot appoint Mr. Carr, the step-father of the applicant. The Court will declare this old lady to be incapable of managing her own affairs, and appoint Mr. G. W. Steytler, in his capacity of secretary of the Colonial Orphan Chamber, as curator of her property.

GENERAL MOTIONS.

THE COLONIAL GOVERNMENT V. MCCAY.

Mr. Giddy applied for the attachment *ad fundandam jurisdictionem* of this Court of certain piece of ground in the district of Maclear, being lot No. 6,993, called Oskar, in an action about to be instituted by edictal citation against the respondent for the recovery of the amount of a debt taken over by him when he purchased the said land.

The Court granted the order, personal service, the process to be returnable on the 12th December.

MICHIEL V. MICHIEL. } 1895. Nov. 21st.

Costs — Security — Domicile — Marriage in community — Funds to defend suit.

M. sued his wife, to whom he was married in community, for divorce on the grounds of her adultery.

In the summons M. was described as being of Johannesburg, in the South African Republic.

The Court, on being satisfied that M. had not left the Colony with the intention of acquiring a new domicile, refused to order him to find security for costs.

On the application of M.'s wife the Court ordered him to contribute £15 to help in defraying his wife's costs, she having, as she alleged, a good defence to the action.

This was an application on notice to the respondent, the plaintiff in the action, calling upon him to show cause why the applicant, the plaintiff's wife, should not be allowed to purge her default, and plead to the declaration, and why further proceedings should not be stayed till sufficient security had been found by the plaintiff, who is at present out of the jurisdiction, for the costs to be incurred by the defendant in the action, and why an advance of £35 should not be made to the defendant to enable her to provide for her defence, she being married to the plaintiff in community of goods,

The action was for divorce on the grounds of the defendant's adultery with one Hendrik Hermans, of the Paarl, and also with one Fortuin (now deceased) at divers times at Wellington, but more particularly about 22 and 24 years ago respectively.

The summons described the plaintiff as being of Johannesburg in the South African Republic, but no reference was made to his domicile in the declaration.

The defendant had not entered appearance and had been barred.

The respondent in his affidavit now alleged that during the time he was in Johannesburg he frequently returned to Wellington, which place he still looked upon and regarded as his domicile.

That he had not the slightest intention to remain in Johannesburg and intended returning to Wellington, or changing his domicile from Wellington to Newlands, Cape Division.

That he was at present employed in Johannesburg as a day labourer.

That he intended earning sufficient money in Johannesburg to enable him to return to Wellington or Newlands, and then purchase a cottage for himself and children to live in.

That he was a poor man and had had to work hard for funds to enable him to bring the action, and that he was totally unable to give security or pay £35 to enable the defendant to defend the action.

That he delayed in bringing the action for want of funds.

The applicant alleged that she had a good defence to the action; her husband, the plaintiff, having committed adultery during his residence in Kimberley.

Mr. Graham was heard in support of the application.

Mr. Buchanan for the respondent, on the question of finding security, cited *Leibbrandt v. Seid Rashee* (2 Sheil, 149).

The Chief Justice said: The delay in filing the plea is quite justified, because the plaintiff has in his summons described himself as of Johannesburg, South African Republic; and *prima facie* the meaning of that would be that the plaintiff was resident and domiciled there. But of course the plaintiff would be entitled to rebut any presumption arising out of the form of the summons. In the present case he has made certain statements which, if true, would certainly tend to show that he has not changed his domicile so as to become a resident of the Transvaal. Under these circumstances the Court is of opinion that the application to purge the default should be allowed; but not the application to find security. We are further of opinion

that the application for a certain amount to enable the defendant to defend this action should be allowed, because a serious statement is made by the defendant in her affidavit to the effect that the plaintiff set up another establishment in Kimberley, and the plaintiff does not deny that. Well, if that be true, it would be a good defence on the part of the defendant in an action for divorce by reason of her adultery, and the effect of that defence, if sustained, would be to debar the plaintiff from obtaining a decree. A defence of that kind will entail some costs, but the plaintiff is apparently somewhat poor, and under the circumstances the sum of £15 should be sufficient. The Court will allow the defendant to purge her default; the plaintiff to stay further proceedings until he shall have paid to defendant the sum of £15 to assist her in defending the suit, her plea to be filed within forty-eight hours after the money has been paid. Costs to be costs in the cause.

[Petitioner's Attorney, D. Tennant, jun.; Respondent's Attorneys, Messrs. Reitz & Herold.]

IN THE ESTATE OF THE LATE HENRY H. FORD.

Mr. Smuts applied for an order authorising the Master of the Supreme Court to pay out to the executor dative of the said estate certain sums in his hands, being the surplus proceeds of certain lots of ground at Walmer, Port Elizabeth, the property of the said Ford, sold in execution for local rates due thereon.

The Court granted a rule *nisi* calling upon all persons concerned to show cause on the 12th December why payment should not be made to the petitioner; the rule to be published once in the "Eastern Province Herald," and to be served on all the parties concerned.

On the return day the rule was made absolute.

In re COETZEE'S INSOLVENT ESTATE. { 1895.
Nov. 21st.

Master of Supreme Court—Meetings of creditors—Section 25 of Insolvent Ordinance.

Where creditors fail to appear at the first or second meeting of creditors called under the 25th section of the Insolvent Ordinance, the Master may call a fresh meeting without the special authority of the Supreme Court.

Petition of François Jean van Helaland Duminy, sen.

The petition set forth that the estate of John

Johan Coetzee, of Woodstock, was placed under sequestration on the 4th November last.

That the Master of the Supreme Court had duly advertised the first and second meetings of creditors in the estate to be held on the 8th and 15th November instant. That these meetings were duly held, but no claims were proved and no trustee elected at the second meeting as by law required.

That the petitioner is a creditor in the estate for the sum of £300, being the amount of a mortgage bond held by him on the insolvent's property, and that he was desirous of proving the same against the estate.

The prayer was that the Court would authorise the Master to call a meeting for the proof of debts and for the election of a trustee.

Mr. Stoney moved.

De Villiers, C.J.: I confess that I do not see any necessity for this application. There have been cases in which the Court has authorised the Master to call a meeting for a special purpose—for instance, for the election of a trustee where there had been a failure to elect one—but those were cases in which the first and second meetings required by the 25th section of the Ordinance had been held. In the present case the meetings of creditors have been called but no creditors appeared. The insolvent, it is true, appeared but his presence did not constitute a meeting of creditors. No meetings, therefore, were held and the Master had full authority, quite independently of the concluding words of the section, to call the requisite first and second meetings without the special authority of the Court. The expense of the present application having been incurred the Court will grant the authority, but in future the Master will be justified in calling the meetings without special authority.

[Applicant's Attorney, Gus. Trollip.]

IN THE MATTER OF THE MINORS SMAL.

Mr. Smuts applied for authority to the tutor dative of the said minors to raise a sum of money on mortgage of certain erf marked No. 21, in the village of Prieska, bequeathed to them out of their father's estate, for the purpose of satisfying the debts thereof and expenses of transfer, and also for authority with the other property of the estate.

The Court granted the order on the terms stated by the Master. Authority given to mortgage for £120; but the account of expenses to be submitted to the Master for his approval.

POWER V. HUNTER. { 1895.
Nov. 21st.

Arbitration—Building contract—Interdict.

A contract for the erection of a building upon the employer's premises having been put an end to by the employer, the contractor insisted upon the right of proceeding with the contract against the will of the employer.

Held, that the employer was entitled to an interdict restraining the contractor from coming upon the premises for the purpose.

Held further, that the right to an interdict was not barred by the fact that the contract provided that the work should be done in a workmanlike manner subject to the condition that should any difficulty arise that cannot be mutually settled, the same be referred to arbitration.

This was an application for an interdict and costs.

The applicant alleged that he was the lessee of certain portion of the farm Oude Kraal in the Cape Division.

That in June, 1894, he entered into a written agreement with the respondent by which in consideration of payment of a certain sum of money he was to erect on the property certain works and buildings in connection with certain Sulphuric Acid Works which the applicant at that time contemplated erecting.

No time within which the work was to be commenced was mentioned in the agreement.

That thereafter in July, 1894, the applicant entered into a further agreement with the respondent for the construction of a road and the levelling of ground on the farm at the contract price of £499.

That on 19th September, 1894, applicant was about to proceed to England by the R.M.S. Hawarden Castle, when at the instance of the respondent a writ of arrest was issued against him on a claim of £450 only a few hours before the departure of the steamer.

That the action of the respondent seriously inconvenienced the applicant, who immediately deposited with the Deputy Sheriff of Cape Town the sum of £525 to cover the amount of the writ and costs.

That the applicant left Cape Town by the said steamer on the 19th September, 1894, after having appointed his brother William Power as his representative in this country.

That work under the agreement of July, 1894, was commenced but not completed before

applicant's departure for England on the 19th September.

That thereafter William Power, acting on behalf of the applicant, settled all the claims of the respondent and cancelled all contracts with him by paying him in cash £450 and giving him a promissory note for £49, which has also been paid, together with costs incurred.

That after the settlement and cancellation the respondent did no further work under the agreements.

That the applicant returned to this country in October last, and was informed within the last few days that the respondent intended proceeding with the work.

The applicant thereupon instructed his attorneys to write to the respondent, who notwithstanding the receipt of the letter, insists on proceeding with the buildings.

The applicant denied that any agreement still existed between him and the respondent, and said that all matters between them as above mentioned had been cancelled.

He submitted that if the respondent had any claim against him it could only be recovered by way of damages, and he prayed for an order restraining the respondent from entering on the property and continuing the work.

The respondent denied that any settlement was arrived at beyond that due to him under the contract of the 19th July, 1894, and he said that the payment of £450, for which the applicant was arrested on the 19th September, 1894, was for work done to that date, under the contract of the 19th July, 1894, and that the balance paid was for the extra work done under the contract after the 19th September, 1894, and for costs of arrest, and for the further costs in a civil suit then pending to recover the balance of £49, the full contract price being £499.

He further said that he had done work under the contract of 24th June, 1894, amounting to £254 6s. 10d., which amount he had not been paid, and that he only received notice of the cancellation of the June contract on the 18th November, 1895.

He denied that the contract had been cancelled, and he said that he was and always had been willing to carry out its terms.

He submitted that (a) he had a right to possession of the premises until he received payment of the sum of £254 6s. 10d.

(b) That the contract of the 24th June, 1894, had never been cancelled.

(c) That the dispute should be submitted to arbitration in terms of paragraph 2 of the contract of the 24th June, 1894, and that in consequence the application should be dismissed with costs.

Paragraph 2 of the agreement dated 24th June, 1894, contained the following condition *should any difference occur or dispute arise which cannot be mutually settled the same shall be referred to arbitration.*

Mr. Rose-Innes, Q.C., in support of the application: The respondent's right of retention in respect of the work which he has done is not disputed, but he cannot proceed with the work against the wishes of the applicant after the contract has been cancelled.

His remedy, if any, is by an action for damages for breach of contract. The only way in which the respondent can be prevented from proceeding with the work is by an interdict, and to that the applicant is entitled.

Mr. Searle, Q.C., for the respondent: The respondent has a lien to the extent to which the value of the land has been enhanced: *Bellingham v. Bloommetje* (Buch., 1874, p. 36); *Voot* (20, 2, 28); *Storey, Equity, Jurisprudence*. He is a *bona-fide* possessor and has done the work in the greatest good faith.

Having regard to the arbitration clause this is not a case for an interdict, and the applicant has mistaken his remedy. See *Van der Spuy v. Paarl Bank Directors* (7 Juta, 245); *Daniel & Co. v. Siebert and Van Eeden* (9 Juta, 31); *Davies v. S. B. Insurance Co.* (3 Juta, 416).

The Court granted the interdict.

De Villiers, C.J.: The real object of this application is to restrain the respondent from proceeding with the building which he had contracted to erect upon the applicant's premises. The applicant admits the contract, but alleges that it was put an end to by mutual agreement. The respondent denies such mutual agreement and claims the right to enter upon the applicant's premises for the purpose of completing the contract. Due notice was given by the applicant that the contract was at an end, as will appear from the following letter addressed by the applicant's attorneys to the respondent: "With reference to a certain agreement made in June, 1891, between Mr. Power and yourself, and the subsequent adjustment of the same by the payment of £499 in full settlement, he is now given to understand, though he can hardly think that such is the case, that you are about to commence work on the property. To prevent any difficulty, he desires to give you notice that any work you may do will be at your own risk, and that he will not be responsible for any further payment." The respondent admits that he received the letter and insisted upon proceeding with the work. Has a contractor under such circumstances the right to proceed with the work upon the premises and against the wishes of the

employer? To the question put in this form Mr. Searle was bound to answer that the contractor has no such right, but he denies the right of the applicant to obtain an interdict on the ground that under the contract all disputes must be settled by arbitration. The contract provides that the work is to be done in a workmanlike manner, and so on, subject to the condition that should any difficulty arise which cannot be mutually settled, the same must be referred to arbitration. Rightly or wrongly, the applicant refuses to allow the building to proceed. If he is right the contract is at an end, no question can arise whether the work is properly performed, and no reference to arbitration is required. If the applicant is wrong the respondent has his action for damages for breach of contract, but as it is admitted that he cannot insist upon proceeding with his work, it follows that he cannot insist upon referring to arbitration the question whether the work has been done in a workmanlike manner. It certainly never was intended to refer to arbitration the question whether an interdict should or should not be granted, and that is the only question with which the Court has now to deal. The interdict must be granted, with costs.

[Applicant's Attorneys, Messrs. Tredgold, McIntyre & Bisset: Respondent's Attorney, D. Tennant, jun.]

Ex parte GOULDING. { 1894.
Nov. 21st.

Pauper suit—Divorce.

Application for leave to sue in forma pauperis in an action for divorce refused.

This was an application by the petitioner for leave to sue her husband *in forma pauperis* in an action for restitution of conjugal rights failing which for divorce.

The petitioner alleged that she was without means, that her husband had admitted to her that he had committed adultery, and that he had subsequently deserted and had failed to provide her with means to support herself and the children of the marriage.

The usual householders' certificate was annexed.

Mr. Watermeyer moved.

The order was refused.

The Chief Justice said: I do not think there are special circumstances in this case to justify its being referred to counsel. I am satisfied that if the petitioner is a deserving woman, and has not the means, that some friend will assist her, and that even the lawyers employed by her will assist her, without applying to the Court

for leave to sue *in forma pauperis*. The Court has lately refused to refer these cases to counsel, unless there are very special circumstances. I am not prepared to say that there are not cases in which the Court would be in duty bound to refer such a petition; but in the present case there are no special circumstances, and the application must therefore be refused.

[Petitioner's Attorneys, Messrs. Van Zyl & Buissinné.]

IN THE MATTER OF THE MINORS VAN JAARSVELD.

Mr. Watermeyer moved for authority to the mother of the said minors to sell certain portion of the farm Wolvekloof, in the district of Wodehouse, bequeathed to them by the will of their late father and surviving mother, in order to discharge debts due by the joint estate, pay off a mortgage bond and interest, and satisfy liabilities incurred in the education and maintenance of the minors.

The Court granted an order in terms of the Master's report,

IN THE MATTER OF THE MINORS MORRIS.

Mr. Watermeyer moved for authority to the mother of the said minors to raise a sum of money on certain land and buildings near the Upper Toll, Cape Town, about to be transferred to her in trust for her children, in order that the necessary repairs may be effected therewith. The order was granted.

THE PETITION OF ANNIE WILTSHIRE.

Mr. Graham moved for leave to the petitioner to sue by edictal citation in an action against her husband for restitution of conjugal rights, failing which for divorce, by reason of his malicious desertion.

The application was granted, citation to be returnable on the 1st February and to be served on the defendant personally, failing which one publication in the "Friend of the Free State."

IN THE MATTER OF THE MINOR ANNA M. HART.

Mr. Buchanan moved for the sanction of the Court to the sale, in so far as the minor is concerned, of certain freehold land, being the remaining extent of the plots laid out on the farm Glen Avon, in the district of Somerset East, a good price having been obtained for same, and it being for the benefit of all that the sale should be confirmed.

The order was granted.

GREEN AND ANOTHER V. MANDY'S TRUSTEE.

Mr. Innes, Q.C., applied for an order in terms of the consent paper filed in the suit between the parties.

Mr. Graham consented.

The order was granted as prayed.

REGINA V. EFFURT. } 1895.
Nov. 21st.

Conviction—Sentence—Appeal—Review—
Magistrate's Court—Gross irregularity.

A person convicted of an offence in a Magistrate's Court and not sentenced, but merely reprimanded, cannot appeal to the Supreme Court, either under the 49th section of Act 20 of 1856 or under the 4th section of Act 21 of 1876.

If, however, there is no evidence to support the conviction he may apply for a review under the 190th Rule of Court on the ground of gross irregularity in the proceedings.

This matter came before the Court on notice to the Attorney-General that the applicant's conviction would be appealed against under Act 20 of 1856, section 49.

The accused was charged before the A.R.M. of Cape Town, with the crime of contravening section 9 of Act 27 of 1882, in that upon the 5th November, 1895, and at or near Cape Town, he did wrongfully and unlawfully behave in a riotous manner in German Town, top of Kloof-street, Cape Town, aforesaid.

The following evidence was given for the prosecution:

P.C. No. 87 (Andrew Clark), sworn, states: I saw prisoner at top of Kloof-street at two o'clock this morning (5th November). He was at the corner of two roads. I was coming to arrest a man for being drunk. Prisoner called me and asked me what was wrong. I did not answer. He called out loudly at the top of his voice and asked me what was the matter. He called out at the top of his voice that I was too smart for my duty, and that I should have answered him civilly. I told him twice the best thing that he could do was to go home quietly. He said he would do what he liked. I then arrested him. There was no further disturbance. He appeared to have been drinking. I should not have arrested him for being drunk if he had not made a disturbance.

Cross-examined by the prisoner: You stopped me in execution of my duty. I was following two drunken men. When you shouted to me my attention was drawn to them.

By the Court: Prisoner was civil outside his

garden in the road. I did not see him come out of his garden.

The prisoner gave the following evidence: About quarter to two I had finished some writing. I heard a noise about the place. I could not locate it. I went outside, looked round the garden and saw no one. I went into the road. I saw a young man. I walked along with him. I came back and was going towards my gate. I met a small coloured boy, to whom I spoke. He said he was waiting for his brother. There was another boy in the road. I saw the policeman talking with the man that I had left. He came towards me. I asked him quietly what was the matter. He answered: What has that got to do with you? Mind your own business." I said I thought it was my business. I thought the boys might have been stealing my flowers in my garden. I did not tell the policeman so. I was annoyed at the abrupt manner in which he had spoken to me. I said I had asked him a civil question and I expected a civil answer. He made a remark, I cannot remember what it was. I said he was one of those smart men who thought he knew everything. He became dictatorial and told me to go into my house. I said I would do exactly as I liked as long as I was not doing any harm. I had my hands in my pockets and he said to me, "What are you doing now?" I said "I have my hands in my pockets." He told me to go with him. I refused. He laid hold of my arm. I said if he did it again I should construe it as a technical assault. He refused to let me go inside and took me to the station. I was quite sober.

By the Court: I was quite alone.

P.C. No. 87, in answer to the Court: I twice told him to go into his house. I did not speak to him dictatorially. After he asked me the first question he became excited and shouted. I had to arrest him because he continued making a disturbance.

The accused was found guilty and reprimanded.

From this conviction the accused now sought to appeal.

Mr. Graham for the appellant.

Mr. Giddy for the Crown objected *in limine* to the case being heard on appeal, as neither the 49th section of Act 20 of 1856 nor the 4th section of Act 21 of 1876 applied.

Mr. Graham: Although the accused, owing to the mistake of the Magistrate, cannot appeal still the Court can hear the matter as though it had been brought by way of review under the 190th Rule of Court. He cited *Regina v. Nathanson* (5 Juta, 109); *Ex parte Hess* (Buch., 1874, p. 2); *Regina v. Smith* (Buch., 1869, p. 176).

The Court made no order.

De Villiers, C.J.: In my opinion the Magistrate made a mistake, for two reasons, in not passing some sentence upon the appellant after convicting him. The offence, that of riotous conduct, was sufficiently serious to require some punishment beyond a mere reprimand, and the appellant ought not to have been deprived of the right of appeal given by the 4th section of Act 21 of 1876 to convicted persons who are sentenced either to fine or imprisonment. In fact, however, the present appeal is not brought under that Act, but under the 49th section of Act 20 of 1856, which applies only to cases in which the appellant has been sentenced to imprisonment for a period exceeding one month, or to pay a fine exceeding £5, or to receive any number of lashes. If the Attorney-General had consented to the appeal being heard under either of these Acts the Court might have considered the question whether the evidence was sufficient to justify the conviction, but in the absence of such consent the Court will not hear the appeal. I do not wish it to be understood that the appellant would have been without redress if no evidence had been given in support of the charge. A conviction without any evidence to support it is a gross irregularity which would entitle the injured party to bring the proceedings under review for the purpose of setting aside or correcting the same. The present application, however, is not for a review under the 190th Rule of Court, and I wish to express no opinion as to whether such an application, if made, would have been successful. The applicant will be well advised if, after to some extent vindicating his character, he allows this paltry matter to drop.

There will be no order on the appeal.

[Appellant's Attorney, John Ayliff.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G.
(Chief Justice).]

His Lordship, on taking his seat on the Bench, stated that his brother, Sir Thos. Upington, was not well enough to attend the court, but with the consent of the parties interested in the cases down for trial, he would take the evidence as a Commissioner, and judgment would be deferred until the Court was properly constituted.

Counsel for the different parties consented to his lordship's suggestion.

M 3

MORRIS V. MORRIS AND PAGE. } 1895.
Nov. 22nd.
„ 25th.

This was an action for divorce on the grounds of the first defendant's adultery with the second-named defendant, against whom damages were claimed.

Mr. Joubert for the plaintiff.

Mr. Norman Lacy, clerk to the Colonial Office, gave formal evidence of the marriage.

Albert Morris, the plaintiff, deposed that he was married to the first defendant on the 30th March, 1887, at Graaff-Reinet. He was an upholsterer. They left there about two years after the marriage and went to Kimberley. After living there nine months they returned to Graaff-Reinet at his wife's persuasion. In another eight months she wished to return to Kimberley, but he declined to shift about again. Two or three days afterwards (on the 22nd November, 1889), she deserted him and went to Kimberley. There was one child of the marriage—a girl. He heard five years ago that she was living at Kimberley with the co-respondent, but he had not the means to bring an action for divorce before. He asked for the custody of the child, that the respondent should forfeit the benefits under the marriage in community of property, and for damages against the co-respondent.

Mr. Joubert said that the co-respondent had, since the pleadings were closed, offered £50 as damages to cover the cost, and the plaintiff was prepared to accept that amount.

Betsy Apollis, a coloured girl, said that about a year ago she lived at Mowbray as general servant with a lady calling herself Mrs. Page. She lived with Mr. Page, and there were two children, aged one and four years. They lived together as husband and wife, and the children were treated as those of Mr. and Mrs. Page.

Dinah Noble deposed that she lived with Mrs. Page as general servant. That lady had told her that she was really Mrs. Morris. Mr. Page lived at Green Point, but he visited and lived with "Mrs. Page" as her husband.

Mr. Charles Willoughby Herold, the plaintiff's attorney, deposed that the co-respondent had signed a document offering £50 as damages.

Judgment was deferred.

Afterwards on 25th November,

The Court granted a decree of divorce, the defendant was declared to have forfeited all benefits by virtue of her marriage in community with the plaintiff, to whom the custody of the surviving child of the marriage was given. Judgment was given against the co-defendant for £50, including costs.

[Plaintiff's Attorneys, Messrs. Reitz & Herold.]

FAURE, NEETHLING AND CO. { 1895.
V. BEYERS. { Nov. 22nd.
Dec. 3rd.

Principal and agent—Father and son—Purchase—Ratification—Repudiation.

The defendant's son having telegraphed to the plaintiffs to purchase oats for account of his father, the plaintiffs purchased the oats, and informed the defendant by telegraph and letter of the purchase.

In an action for the price the defendant denied his son's agency.

It was proved that the plaintiffs' telegram and letter were received by the defendant's son, but that, before delivery of the oats, the son informed the father of the purchase on his account.

Held that, in the absence of any disavowal by the father, he must be deemed to have authorised the son to effect the purchase in his name and was therefore liable for the price.

This was an action to recover £128 2s. 6d., being the purchase price of 250 muids of seed oats bought by the plaintiffs on the 1st April last for and on account of the defendant, on instructions received from Harry Beyers, the defendant's son.

The declaration alleged that on 1st April, 1895, the defendant through his duly authorised agent, one Harry Beyers, instructed the plaintiffs to procure for him 250 bags of oats at a price not to extend 10s. per bag.

That acting on the said instructions the plaintiffs purchased for the defendant 250 bags of oats at 9s. 9d. per bag, with 6d. extra for every bag not returned. Payment to be made three months after the said date.

That the oats were duly delivered to the defendant, who has not returned the bags, and the plaintiffs have paid the sum of £128 2s. 6d. in respect of the oats so purchased for the defendant.

The plaintiffs claimed payment of the sum of £128 2s. 6d., with interest from 1st July, 1895, and costs.

The defendant in his plea denied the agency of his son, Harry Beyers.

He denied that he instructed the plaintiffs or authorised or instructed anyone to purchase the oats on his behalf or that they were ever delivered to him.

Replication general.

Mr. Innes, Q.C., and Mr. Buchanan for the plaintiff.

Mr. Graham and Mr. Macgregor for the defendants.

Johannes Enoch Neethling, member of the firm of Faure, Neethling & Co., auctioneers, at the Paarl, deposed that on the 1st April last, while holding a sale at Klapmuts, he received a telegram from Harry Beyers (the son of the defendant) to the following effect: "If oats fetch 10s. or so, keep 200 bags for account John Beyers, sen.; reply if bought." In consequence of which he bought 250 bags of oats at 9s. 9d., *ex* bags, from Ryan, Rood & Co. for the account of the defendant. As soon as he got home he wired to defendant: "Secured oats 9s. 9d., writing." He wrote to J. M. Beyers (the defendant) on the 2nd April stating that the oats had been bought. The oats were duly delivered. During the month of April he visited the Strand, where the defendant was staying and saw him several times, but the defendant never mentioned the subject of the oats. The rule was to give three months' credit, so that payment was due on the 1st July. On the 2nd, the 13th, and the 27th July, he addressed reminding notes of the account to the defendant. On the 29th July he received a letter from Harry Beyers stating that his father wished him say that as the matter of the oats was his (Harry's) affair, and he was rather short of money, he must ask him to wait another month. He had never been paid, but he (witness) had paid Messrs. Ryan, Rood & Co. On the 6th August he wrote to the defendant that as the bags had not been returned to Ryan, Rood & Co., a charge of 6d. per bag would be made. He then received a note from the defendant stating that he had not seen any oats, that it was his son Harry's affair, and that he (the defendant) had nothing to do with it. He (witness) wrote to Harry Beyers the same day, but the letter was returned through the dead letter office, and he then learned that Harry Beyers had absconded. He then informed the defendant that he held him liable for the amount, in reply to which he received a letter from the defendant's solicitor, stating that he knew nothing about the matter and that he repudiated liability.

Cross-examined by Mr. Graham: He never had any transactions but this one either with the defendant or Harry Beyers. He never received any replies from the defendant until August 9 to his numerous communications about the oats. He thought at the time he wrote to the defendant that the son had misled him; but subsequently he heard that the defendant himself had received the telegram of the 2nd April, and therefore knew all about the transaction.

Thomas Frederick Metcalf, stationmaster at Stellenbosch, deposed that the consignment of oats from the plaintiff to "J. M. Beyers, sen." (the defendant), was delivered to Messrs. De Villiers Bros., carriers, at Stellenbosch, in accordance with Mr. J. M. Beyers's instructions, given in the November previously, to deliver any goods for him. The oats were signed for by Harry Beyers.

The Hon. P. H. Faure deposed that he was a member of the plaintiff firm, but had no cognisance of the transaction. On the 5th September he met the defendant in a railway carriage at Cape Town, and had a conversation with him. Beyers was despondent over a recent judgment given against him in respect of his son Harry, and referred to the claim of his (witness's) firm. He (witness) told defendant that what he ought to have done was to have at once communicated with Mr. Neethling when he received the wire notifying that the oats had been purchased, and then Neethling could have stopped the delivery of the oats.

Johannes Jacobus Haupt, a farmer, residing at Groot Drakenstein, deposed that he was present at the conversation referred to by the last witness. He did not hear the defendant reply when Mr. Faure said he ought to have wired to Mr. Neethling. After Mr. Faure had gone the defendant told witness that he did not see why he should reply to every telegram he received.

By the Court: Before Mr. Faure left the defendant had led them to infer that he had received Neethling's telegram.

Mr. Graham applied for absolution from the instance.

The point was reserved.

J. M. Beyers deposed that he was at the Strand in April last. He never received any telegram from Neethling notifying the purchase of the oats. The only telegram he ever received in reference to the oats was one from his son Harry at Stellenbosch to himself at the Strand on April 2, "Wire from Neethling; oats mine." He did not receive any letter from the plaintiffs stating that they had bought oats for him (witness) on his son's instructions. He received no letters or memos on the subject until the 6th August, the day his son absconded. Regarding the telegram referred to in the conversation with Mr. Faure, he (witness) thought it referred to the telegram from his son Harry.

Cross-examined by Mr. Innes: He thought it remarkable that his son should have telegraphed to him about the oats, as he never on other occasions mentioned his transactions to witness. He had nothing to do with his son's affairs, and did not reply to the telegram from Harry, because he had nothing to do with it. Letters in-

tended for him had been opened and intercepted by his son in many matters.

Re-examined: He believed his son was in Bulawayo, but he could not say.

By the Court: He was surprised at receiving the telegram from Harry, and he was anxious to see Neethling; and told his daughter to tell him so, but when Neethling came to the Strand he (witness) did not seek him out or say anything about it. Neethling ought to have come to him. He asked his son Harry why he had wired, but he did not pursue the matter or take much notice, as he never anticipated such proceedings as the present.

Henry J. B. Morkel deposed that he was at one time acting postmaster at Stellenbosch. Harry Beyers frequently applied for letters and telegrams addressed to his father, and they were handed over without question. Once or twice Harry gave instructions that letters for his father should be kept until he (Harry) called for them, and these instructions were followed. While J. M. Beyers was at the Strand Harry took over all letters and telegrams addressed to the family.

Cross-examined: The tapes and telegrams were destroyed after the expiration of six months, but an abstract was kept showing by and to whom telegrams were sent and received, but not the contents of the telegrams. It could be ascertained if the defendant wired back to his son in reply to the telegrams.

William Benjamin Hunt deposed that Harry Beyers stored certain oats at his (witness's) father's store. On the 10th April he bought 100 bags at 9s., and on the 19th April 100 bags at 8s. from Harry Beyers. It was arranged, however, that Harry could always buy them back at the same prices. He did take some back in accordance with this arrangement.

Andries François de Villiers deposed that on the 10th April Harry Beyers instructed him to deliver the oats at Hunt's store, and he did so. He always took Harry Beyers as acting for his father.

Mr. Innes applied to put the record in the recent case of *Marais v. Beyers* (the same defendant).

Mr. Graham opposed the application and cited: *Stephen on Evidence*; Art 42, Ordinance 72 of 1830, section 42; *Taylor on Evidence* (sections 455—459); *Morgan v. Nichol* (36 L.J. C.P., 86).

The Court held the record to be inadmissible.

Mr. Innes, Q.C., for the plaintiffs: The question to be determined is whether the defendant is bound by the order given by his son in his name. It is impossible to give direct proof of authority. There are only two persons who

can speak as to that, viz., the defendant and his son. But the facts show that the authority must be presumed. If the wire sent by the plaintiffs on the 1st April was received by the defendant he cannot escape liability even though he had not given the order. His silence amounted to ratification. See the evidence of Faure and Haupt. The presumption is that the telegram was received by the person to whom it was addressed. If the defendant had at once repudiated the transaction the oats would not have been delivered. Again the defendant must have received one at least of the many letters which were sent to him. Harry Beyers could not have intercepted all the letters addressed by the plaintiffs to the defendant. If the Court is satisfied that the defendant received any of these communications he is liable, on the grounds of negligence alone. Where one of two innocent parties sustains a loss through the fraud of a third person he is to be held liable whose negligence conduced to the fraud.

Further the wire from Harry Beyers to his father ought to have aroused the latter's suspicions and put him on enquiry. Where the relation of father and son exists between principal and agent less proof of direct authority is required than in ordinary cases of agency. See *Story on Agency* (section 256.) In such cases the duty of repudiation on the part of the father is very great.

Generally on the case it is submitted :

(a) That the telegram of 1st April proves original direct authority given by the defendant.

(b) If not, it was notice to him that a sale had taken place in which he was concerned and his acquiescence binds him.

(c) Even if was not notice, it was his conduct which rendered the deception possible, and he must bear the loss.

Mr. Graham for the defendant contended that there could be no ratification unless the defendant had full knowledge of all the facts. He cited *Fitzgerald v. Dressler* (7 C.B., 396); *Storey on Agency* (section 239); *Parsons on Contracts* (Vol. I., p. 152); *Evans* (pp. 58 and 79).

Mr. Innes, Q.C., in reply referred to *Storey on Equity Jurisprudence*, section 400 (b).

De Villiers, C.J.: There is no difficulty as to the law applicable to this case, and the only doubt which has arisen relates to a question of fact. The defendant's son, Harry Beyers, telegraphed to the plaintiffs—a firm of auctioneers—as follows: "If oats fetch 10s. keep 250 bags for account John Beyers, sen.; reply if bought." On the same day the plaintiffs telegraphed, not to Harry Beyers, but to the

defendant, on whose behalf the first telegram had purported to be sent: "Secured oats 9s. 9d., writing." On the following day the plaintiffs wrote to him the particulars of the purchase. The letter was addressed to the defendant at Stellenbosch and was duly stamped and posted. After that three distinct communications were made by the plaintiffs to the defendant in letters sent to Stellenbosch. At the time when the first telegram and letter were sent the defendant was on a visit to Somerset West. Harry Beyers had gone with his father to Somerset but remained there only one night and on his return to Stellenbosch must have opened the telegram addressed to the defendant. He thereupon telegraphed to the defendant as follows: "Wire from Neethling oats mine." (After commenting on the evidence the Chief Justice proceeded:) The doubt which arises is whether this telegram, read by the light of the rest of the evidence, sufficiently proves that the defendant knew that the oats had been ordered by his son on his behalf and that the plaintiffs had supplied the oats to the son in the belief that they had been so ordered. My brethren are satisfied that the defendant was fully aware of the whole transaction. This is a question of fact upon which I need say no more than this, that I am not prepared to differ from the rest of the Court. In regard to the law applicable to the facts thus found I entertain no doubt. There has, it is true, been no evidence of a course of dealing sufficient to establish the relation of agency between the defendant and his son before the transaction took place. If therefore, the defendant was left in ignorance as to what took place between his son and the plaintiffs, he could not upon any principle of law have been held liable for the price of the oats supplied to his son. His knowledge, however, that his son had pledged his credit, and that the plaintiffs were parting with the oats in the belief that he and not his son was the purchaser, made it incumbent on him to repudiate the purchase if he wished to escape liability. The plaintiffs did everything that could be expected from them. They informed the defendant immediately of the purchase, and if he had written at once repudiating his son's agency the oats would not have been delivered. Silence, under such circumstances, must surely be deemed equivalent to consent. And even if there had not been proof of consent before the completion of the purchase by delivery, the continued silence of the defendant afterwards may fairly be construed into a ratification of his son's acts purporting to be done on his behalf. It has been well said by *Storey* (on Agency, section 256): "Where an agency

actually exists, the mere acquiescence of the principal may well give rise to the presumption of an intentional ratification of the act. The presumption is far less strong, and the mere fact of acquiescence may be deemed far less cogent, where no such relation of agency exists at the time between the parties. However, if there are peculiar relations of a different sort between the parties, such as that of father and son, the presumption of a ratification will become more vehement, and the duty of disavowal on the part of the principal more cogent, when the facts are brought to his knowledge." In support of this view he cites a passage from *Paulus* in the *Digest* (14, 6, 16) and the comments of *Pothier*, *Gothofredus* and *Cujacius* on that passage. Under the Roman law, no doubt, the peculiar relations between the paterfamilias and his family would make the presumption of ratification stronger than with us, but even under the existing conditions a third person dealing with the son would have greater justification for believing the son's statement that he was acting for his father, than if such a statement had been made by a stranger. It was certainly the defendant's duty to disavow his son's representation, and in the absence of such disavowal he must be deemed to have ratified, and therefore authorised the purchase on his behalf. The judgment of the Court must be for the plaintiff with costs.

Mr. Justice Buchanan : I agree with the judgment just delivered. As to the law in this case there can be no doubt. As to the facts I have not had the same difficulty which my learned brother, the Chief Justice, has had in coming to a conclusion. I did not hear, nor have I read the evidence in the previous case, and consequently it cannot affect my mind ; but on the evidence in this case I feel it impossible to come to any other conclusion than that the father must have known of the intended transaction before it was entered into ; that the son intimated to the father that the transaction had been completed and that the letters sent by the plaintiffs were properly addressed, and came to the father's notice. Until the son had left the country the father never repudiated the transaction and never gave any notice that he would not consider himself bound. I think the plaintiffs were perfectly justified in concluding that the defendant ratified the bargain, as well as previously authorised it.

Mr. Justice Upington : I can only add that I also concur, and that if I were sitting as a juror, and that telegram had been commented on before me—"Wire Neethling, oats mine"—I

should have been perfectly satisfied that there was some previous communication between the father and the son.

[Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorney, C. C. de Villiers.]

GASSON V. BLACKING AND
IZDEBESKI. { 1895.
Nov. 25th.

Trial—Removal.

The Court refused to order the removal for trial to Kimberley of a cause which had been set down for hearing in the Supreme Court, where (1) the amount in dispute was large, (2) the witnesses were few, and (3) there was an absence of proof that the applicant (defendant) would be prejudiced by the case being tried in the Supreme Court.

This was an application on notice by the defendant in a suit now pending in the Supreme Court calling upon the plaintiffs (respondents) to show cause why the suit should not be removed for trial to the High Court at Kimberley.

The applicant alleged that he was a chemist and assayer residing in Kimberley.

That both the plaintiffs reside at Beaconsfield, which adjoins the town of Kimberley, and is connected with that place by a tramline.

That on the 5th October last the plaintiffs issued a summons out of the Supreme Court, claiming from him (a) cession and transfer of half share in a company or partnership, styled the Mint Syndicate, the plaintiffs tendering to him the sum of £80, the purchase price thereof, or in lieu thereof the sum of £2,500, the value of the half share; (b) the sum of £5,000 damages sustained by reason of the defendant's refusal to complete the contract of sale; (c) costs of suit.

Appearance was entered and declaration filed, the defendant pleading a denial of the plaintiffs' claim.

The case was set down for the 28th inst.

On the 16th inst. the defendant's attorney wrote to the plaintiffs' attorneys asking them to consent to the removal of the case to the High Court. This request was refused.

The applicant now alleged that his business as a chemist was such that his personal attendance and attention were constantly required, and as he had no qualified assayer in his employment he had personally to superintend assays, which formed a considerable portion of his business.

That should the cause be heard before the Supreme Court his attendance would be absolutely necessary, and it would cause him con-

siderable personal inconvenience to leave his business, besides putting him to great expense to obtain a qualified chemist and also an assayer to attend to his business during his absence.

He said that all the witnesses in the suit, as far as he was able to discover, resided either in Kimberley or in Beaconsfield, and that in every way the costs of the suit would be considerably lessened should the trial take place at Kimberley, besides being more convenient and desirable for all parties.

In answer to the above, the first-named respondent alleged *inter alia* that no great personal inconvenience would be caused to the defendant, and that during the short extra time spent in journeying to and from Cape Town, the business of the defendant would not be injured.

That in July last the applicant was absent from his business for five days in Bechuanaland doing prospecting work for the first-named respondent, and the only expense incurred was the salary of an assistant to look after his business at £5 per week, the assaying work of the defendant being left over until his return.

He denied that the costs of the action would be increased by bringing it in the Supreme Court, and he said that it would put himself and his co-plaintiff to extra legal expense if the cause were removed in its present stage to Kimberley.

That the plaintiffs were desirous of having the action heard in the Supreme Court, and for that reason commenced proceedings in Cape Town.

He lastly said that the hearing of the action would not be lengthy, that the parties and witnesses attending Cape Town would not be delayed for any length of time, and that no special cost would be incurred or inconvenience felt by the parties by reason of its being heard in Cape Town over and above what are usually incurred in cases from the country.

The applicant, in his replying affidavit, said that at the time of his visit to Bechuanaland he had a qualified chemist to manage his business, who was not now in his employment, and that he could not secure another qualified man before January next.

He further said that before going to Bechuanaland he had little or no assaying work to do, but that of late, owing to the excitement of the reported discovery of gold in Griqualand West, he had a very great deal of assaying work to do which required his constant personal attention.

He denied that the plaintiffs would be put to extra expense by the case being heard in Kimberley, and repeated his assertion that the greatest inconvenience would be caused him by coming to Cape Town.

Mr. Searle, Q.C., in support of the application: The general rule is that the plaintiff can select his forum, but the Court has regard to the balance of convenience in deciding such matters. *Rothman v. Woodrow & Co.* (4 E.D.C., 32). The transaction took place at Kimberley, the witnesses on both sides reside there, and the balance of convenience is clearly in favour of the case being heard in the High Court.

Mr. Rose-Innes, Q.C., for the respondents.

The Court made no order.

The Chief Justice said: The rule always followed in this Court is that the plaintiff is entitled to select his forum, and if the defendant wishes to remove the case to another forum it lies upon him clearly to prove that the balance of convenience is entirely in favour of such a removal. In the present case it appears that the amount in dispute is a large one; that there are not very many witnesses, and that the plaintiffs for some reason, which they apparently do not wish to disclose, are desirous that the case should be heard in this Court. Well, I think under these circumstances, in the absence of any clear proof that the defendant would be seriously prejudiced by the case being tried here, that the Court ought not to accede to the defendant's request. I may say that if it had been a question whether the trial was to take place this term or not, I should certainly have thought that it would have been very inconvenient for the defendant to come down this term and have the case tried here, because he is a chemist, and says he has no assistant, and will not have one till January next; but as the case will not be heard till February, and by that time he will have an assistant, at all events that inconvenience will be removed. Certainly one reason why a trial in this Court would be preferable is this—that it is always open to appeal to this Court, and therefore it is better as a general rule that this Court should be the Court of first instance. For these reasons we are of opinion that the trial should not be removed. At the same time we think that the costs of this application should stand over until after the trial, when we shall be in a better position to judge if it is a case which could more conveniently have been heard in the High Court of Griqualand. There will be no order, but the costs of this application will stand over.

[Applicant's Attorneys, Messrs. Scanlen & Syfret; Respondents' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

**BOURHILL'S ESTATE V. ARK OF SAFETY LODGE,
CALEDON.**

Mr. Tredgold moved, as a matter of urgency, for the extension of the return day from the 12th December to the 18th January.

The application was granted.

**DE KLERK V. LE ROUX AND
SAMAAL.** { 1895.
Nov. 25th.
" 26th.

**Declaration of rights—Farm—Dispute as to
boundaries.**

This was an action for a declaration of rights, for £50 damages, and for an interdict, instituted by Paul Andries de Klerk against Frederick Daniel le Roux and Moos Christian Samaai, all of the district of Tulbagh.

The plaintiff annexed a plan to his declaration, showing the boundaries of his farm Straatskerk. He alleged various acts of trespass by the defendants, the owners of the adjoining farms Sweet Home and Klipdrift, and claimed as against both of them a declaration of rights as to the true boundaries of his farm, and as against the first-named defendant £50 damages, an interdict, and costs.

The first-named defendant in his plea denied the correctness of the boundaries of the plaintiff's farm as shown in the plan annexed to the declaration, and annexed a plan of his own, showing the correct boundaries of the plaintiff's and the defendants' farms.

He alleged various acts of trespass by the plaintiff on his farm, and he claimed in reconviction a declaration of rights, £200 damages, an interdict, and costs.

The second-named defendant did not contest the action.

Mr. Rose-Innes, Q.C., and Mr. Graham appeared for the plaintiff.

Mr. Smuts for the defendant.

The facts appear sufficiently from the judgment.

The Chief Justice said: The case has been very ably and very fairly argued by the counsel for the defendant, but he has not succeeded in convincing the Court that the overwhelming evidence on behalf of the plaintiff in favour of the boundaries claimed by him is not to be believed. Amidst all the conflicting evidence one fact stands out clearly, and that is that the quince hedge, as it originally stood, is the old boundary on the north; it has always been considered the boundary line between the plaintiff's and the defendant's properties on the north side, that is certain; none of the witnesses,

whatever they might have said on other matters, could deny that. The quince hedge no longer stands, but in lieu of it there is a wall and a ditch. Now, if the line claimed on behalf of the defendants is to be admitted, there can be no doubt whatever that the quince hedge ceased to be the boundary. The counsel for the defendant says the boundary was only a yard from it; well, it might be only a yard, but his admission that it is a yard at all events shows that by adopting his line the quince hedge ceased to be a boundary. Now in a matter of this kind, where the extent of land is so small, a yard makes a considerable difference. If it had been a question of thousands of morgen, such as often have to be decided in this court, possibly a yard would make no difference, but when it comes to a small plot of this kind even a yard means a good deal. I am not quite sure either that it would be a yard between all points, because it appears to me that the line claimed by the defendant—the line H—T in the plan—would not run parallel to the quince hedge at all, so it might be a yard at one point, but considerably more than a yard at another point. As I have already observed, the quince hedge stands out as one bit of evidence about which there is no conflict, and clearly proves that the line claimed by the defendant is not the correct one. Now I come to the line claimed by the plaintiff—H—O in the plan—and even the defendant's own witnesses admit that the beacon which the plaintiff now claims is as nearly as possible in the continuation of a line drawn from P to D in the plan, which is the line where the hedge stood; two of the witnesses at all events say that it is so, while a third witness says the line might be a little lower down. I am perfectly satisfied that although it is possible that the line P to D continued might not exactly strike the beacon it would strike it as nearly as possible, and in that case there is more credence to be given to those witnesses who claimed that H—O on the plan is the line than to those who claim that H—D is the line. Now in this case we have to a great extent to lay aside all the evidence as to the original diagram. The original diagram was made as far back as 1819, and since that date the properties have been much altered. It is the occupation of the defendant's predecessors quite irrespective of the original diagram that should be the guide. The original diagram shows that the grant was of a farm going up to what is now called the Dwaag River; in point of fact, the occupation has been right on to the Berg River. Now both rivers are marked on the original diagram, but the property

is intended only to come on to the Dwaag River, whereas in point of fact the predecessors of the defendant have always occupied right down to the Berg River. I gather from this that the extent of land which is in this way taken for the farm Straatskerk was more than was given by the original grant; and the diagram cannot therefore assist this Court much, and we have heard from Mr. Moll that the deductions made from the original grant have been generally incorrect so far as they have had anything to do with this matter, and that he has found it impossible, with regard to the former surveys, to find out the true boundaries. Therefore we must fall back on the evidence of the oldest witnesses, and the most trustworthy witnesses who can speak of the boundaries; but we want witnesses, not to show that there was a heap of stones here and a heap of stones there, but that such heaps of stones were recognised by the owners of the adjoining farms as the beacons between the two farms. Now in this respect the plaintiff's witnesses are so much more trustworthy because they lived on the place, and the time of which they speak dates further back. The first witness in importance is Redlinghuys, who, in my opinion, gave his evidence very fairly and very intelligently, and he says he bought the farm now belonging to the plaintiff as far back as the year 1857, and that in that year old Mr. Lowe pointed out the beacons to him, and the beacons so pointed out were the beacons which the plaintiff now claims; and he says that at that time there were no old foundations at the place where the hut was afterwards built; but he says at that spot a beacon stood, and further he says that at the point O on the plan there also at that time stood a beacon, and he swears positively that the other spot—T on the plan—where the defendant has lately erected an iron pole, is not the place where the beacon originally stood on the banks of the Berg River. Now, that was in 1857, and the old gentleman says he occupied that place twenty-two years, and that while he was the occupant there, nobody said him nay; everybody recognised that those two beacons, H and O, were the beacons he was entitled to as the owner of Straatskerk. Well, it is said that there stood at that time another beacon, about 24 yards distant; but there is nobody who says that such a beacon was recognised as the boundary between Straatskerk and Sweet Home or Klipdrift. That is the evidence we want; that there was a recognised beacon, not the mere fact that there was a heap of stones. Unless the owner sees in it a beacon, and recognises it as such, there is nothing to show that a mere heap of stones is a

beacon, and I believe Redlinghuys, when he says that if there was a heap of stones he never saw it, and that is quite enough for the plaintiff's case. Well, Redlinghuys occupied Straatskerk for twenty-two years from 1857, and he then sold it to Malan, who occupied it up to 1890. Now in my opinion Malan gave his evidence very fairly, and was, in fact, the best witness that has appeared in this case; he gave his evidence with the greatest intelligence, and there is no reason for suggesting any bias whatever on the part of Mr. Malan, who has come all the way from Adelaide for the purpose of giving evidence, being wholly unconnected with the parties or the dispute. He states that when he bought the farm, Redlinghuys pointed out the beacon at H on the plan, where the hut had been built, and there was then an old "muragie" on the site of the beacon, and he swears positively that that was admitted to be the beacon, and he explains how it was removed. On one occasion De Wet, who was the owner of an adjoining farm, had to make a threshing-floor, and the stones of this very beacon were removed, and Malan objected to it. If De Wet had then said it was not a beacon and asserted his rights, it might have assisted the defendant now; but unfortunately for the defendant, De Wet, his predecessor, acquiesced in Malan's objection. He said he had made a mistake, and proposed to put it back in its place. Unfortunately Mr. Malan did not insist on this being done; if he had only insisted on De Wet keeping his promise this lawsuit could not have happened; this is all owing to Malan's negligence and want of care. They were apparently friendly neighbours, and had no disputes but one—that about the hut. On one occasion there was a hut built by De Wet, and after it had been built Malan told him it was built on his (Malan's) land. De Wet was very neighbourly and said, "Let us draw a line," and they then found the hut was on the plaintiff's land, but it was agreed between them that if De Wet, who went occasionally to Saldanha Bay, brought presents of fish to Malan in recognition of his right to the land it would be sufficient. So we have these two predecessors settling their disputes in this way, and nothing could be stronger as to what the owners thought to be their respective rights. Well, many witnesses say that another beacon, which is shown at "small m" on the plan, is the true beacon, but not one witness has said that it was ever recognised as a beacon by any predecessor of De Klerck. Neither Redlinghuys nor Malan recognised it, and so this evidence does not go very far; all that is proved is that there was a mound of stones, and it is also

proved that when there was a survey made by Mr. Meiring, who, in endeavouring to find a straight line, according to the witness Reynert, who assisted Meiring, drove a peg into some stones. Well, all that proves is that at some time or another there might have been a beacon, but it does not prove, after all the evidence adduced on behalf of the plaintiff, that it was recognised by the occupants of the farms from 1857 to 1895. It is quite possible that if we compare the line with the original diagram it might show a beacon at "small m," but, as I said before, we have not to deal with documents that have been set aside, but with the occupation from the year 1857, which is beyond the period of prescription. Well, with regard to the difference between the beacons O and T on the plan there is a dispute, but here again the quince hedge assists the plaintiff's case, because, although a straight line drawn from P to D might not exactly strike O, at all events it is more likely to strike the immediate neighbourhood of O than of T. For these reasons I am of opinion that the Court is bound to come to the conclusion that the true beacons are the beacons H and O. If I thought that by postponing the case for the purpose of obtaining the evidence of Mr. Meiring it would enable the Court to do more justice between the parties, I should, notwithstanding the great expense of such a course to the parties, do so; but I do not see that his evidence really could assist the Court, because, after all, the question must depend on the credibility of witnesses. Meiring may be able to show that according to the diagrams the present beacons may be correct, but the question is not what the diagram shows, but what the occupation has been of the plaintiff's predecessors. The evidence shews that that occupation has been in accordance with the boundary now claimed. In my opinion therefore the declaration should be that the true beacons and boundaries are A, N, H, and O, according to the plan B. I think that plan B is better than plan A, which is out of scale altogether and not very accurately drawn, so it will be according to plan B. Then we come to the question of damages. I think on the whole the plaintiff had better give up his claim for damages, because the real question the Court has to decide and which the parties come to the Court to decide, is the question of the boundaries. Whatever the defendant has done in the assertion of his supposed rights is not important, and the damages have not been much. The defendant is a poor man, and I feel confident the plaintiff will not press any further for damages. Now as to the claim in reconvention,

of course as far as the boundaries in dispute are concerned, as already mentioned, no claim in reconvention can be allowed. Then as to the furrow, I think that on the whole the conclusion the Court must arrive at is that although by Le Klerck's acts Le Roux's furrow may once or twice have been somewhat injured, it was not done wilfully on Le Klerck's part. In the course of leading water to his land he may have done some damage, but I do not think there was any intentional injury. At the same time I must warn Le Klerck that if it is proved hereafter that there has been any intentional injury to the furrow he will have to pay damages. He receives rent from the defendant for the use of the furrow, and it is his duty therefore, as the owner of the land, not to do anything on his own land to injure the proper use of the furrow by the defendant. Then I come to the question of the right of road, which is incidentally claimed by Le Roux, but only incidentally. The claim in reconvention alleges that Le Klerck wrongfully and unlawfully erected a barbed wire fence on the plaintiff's property, and obstructed a right of way to which he (Le Roux) was entitled. Now, the only right of way which clearly has been proved is the right of way by the road to the village, and that right of way has not been obstructed, because an opening has been left in the barbed wire fence which will enable Le Roux to go to the village. Now, in a question of servitude of this kind, it should always be borne in mind that the owner, and not the servient tenant, has the right to point out where the servitude should be exercised, so long as it is reasonable; and therefore, even if the plaintiff has closed up some portion of the road which he objects to being used, if the portion left open enables the defendant to go to the village of Tulbagh, so long as it is not an utterly unreasonable route, he cannot complain. And then it is said that the defendant ought to have the road to the station, but upon this the evidence is so unsatisfactory that it is impossible for the Court, upon the pleadings as they stand, to fix any right of way as to the road which the defendant would be entitled to use. If the defendant had wished to use any particular road he should have marked that road on his plan so as to give clear notice to the plaintiff as to what road he wished, but there is nothing to show the exact road the defendant says he is entitled to use, nor is there any evidence to show that there is a road leading to the station. At all events there is no such claim for the use of any particular road on the land over which the plaintiff is *dominus*,

to justify any order on that part of the defendant's claim. Then with regard to the water, I do not know if it is the servitude *aqueductus* that is claimed; nor is it clear that Le Roux is prevented from using the water. If the defendant (Le Roux) is entitled to the water upon the plaintiff's land, then he should have pointed out upon the plan the exact road which he required for the purpose of going over his land for the purpose of using that water. The evidence is very vague; it appears to have been used in times of drought, when the furrow could not be used, but even if it had been continually used the plaintiff would have been justified in saying: "Go round this fence (unless the distance is so long as to be perfectly unreasonable) for the purpose of taking the water." I do not know what the distance would be, but it could not be very great, and then the whole fence has not been closed up; and if the defendant can go to the water on the plaintiff's land, it must be remembered that it is the plaintiff's land the water has to be taken from, and if the defendant can go by another road, which is not unreasonably round-about, he should do so. On this point also there is not sufficient evidence to justify judgment for the defendant. As to the other claim about shooting a pig, the plaintiff was justified in shooting the pig if it came into his orchard. As to the mules, I think the defendant is most unreasonable in the matter. It is clear that some mules were on the undoubted property of the plaintiff, not the disputed land at all, and when the plaintiff sent his boy to take possession of the mules the defendant's son came and rescued the mules from the boy, and yet after that has been done the defendant makes this seizing of the cattle a ground of complaint against the plaintiff. So that for all the reasons I have mentioned I am of opinion that judgment must be for the plaintiff, and the Court declares that the line A N H O on the plan B is the true boundary line between the properties, and grants an interdict restraining the defendant from trespassing beyond the line so defined; the defendant to pay the plaintiff's costs; absolution from the instance on the claim in reconvention.

Mr. Innes said he was instructed to press for damages only with regard to the wire fence removed by the defendant, and to ask for the plaintiff's costs as a witness.

The Chief Justice said that no damages would be allowed, but the plaintiff must have his expenses as a witness as claimed.

Plaintiff's Attorney, G. Montgomery-Walker;
Defendant's Attorney, C. C. de Villiers.]

WESSELS V. WESSELS.

1895.
Nov. 27th.
Dec. 12th.

Husband and wife—Separation *a mensa et thoro*—Divorce—Ante-nuptial contract—Dowry—Mutual promises—Forfeiture of benefits.

Misconduct on the part of one spouse, which is sufficient to justify a decree of judicial separation, entitles the injured spouse to an order rescinding any ante-nuptial promise which he or she may have made of a gift to take effect on his or her death, but, on the other hand, where mutual promises of this nature have been made by both spouses, the injured spouse, who elects to have his or her promise rescinded, can only obtain the order subject to a renunciation of the promise made in his or her favour.

Benefits which have already accrued are not liable to forfeiture upon a decree for separation a mensa et thoro.

— — —
This was an action for judicial separation, instituted by the plaintiff against her husband on the grounds of his cruelty.

The declaration alleged that the parties were legally married on the 1st May, 1893, at Robertson, where they reside.

That they were married by ante-nuptial contract, which excluded community of goods, liability of the debts of each other, and the marital power, and provided that the plaintiff doth hereby give unto the said Pieter Gerhardus Wessels half of her whole estate as a marriage gift, the same, however, only to be paid at her death, should that happen before that of the said P. G. Wessels.

That between the months of March, 1894, and October, 1895, the defendant cruelly used and ill-treated the plaintiff and her minor children (born of this and of a former marriage), and threatened on more than one occasion to take her life, so that it has become impossible for the plaintiff any longer to live and cohabit with the defendant.

The plaintiff claimed:

(a) A decree of judicial separation.

(b) The custody of the children.

(c) Payment of the sum of £10, payable monthly, for the support and maintenance of herself and the minor child of this marriage.

(d) A declaration that the clause in the ante-nuptial contract, purporting to make over as a gift to the defendant half of her estate, is of no force or effect.

(e) Alternative relief and costs.

The defendant, in his plea, admitted the marriage, but denied the charges of cruelty.

Replication general.

Mr. Juta, Q.C., for the plaintiff.

Mr. Innes, Q.C., and Mr. Close for the defendant.

The evidence went to show that the defendant was much addicted to drink, that on two occasions at least he struck the plaintiff, that his language towards her in the presence of the children was coarse and disgusting, and that he was in the habit of drawing offensive comparisons between his wife and a cousin of hers with whom he had committed adultery: an offence which was condoned by the plaintiff.

On the facts the Court granted a decree of separation *a mensa et thoro*, but heard counsel on the claim for a forfeiture claimed in prayer (d) of the declaration.

In the ante-nuptial contract the defendant settled one half of his estate on the plaintiff after his death: The plaintiff, during the hearing of the case, expressed her willingness to renounce this benefit.

Mr. Innes, Q.C., on the question of forfeiture cited: *Brouwer* (2, 29, 17); *Bynkershoek* (2, 9); *Voet* (24, 2, 17); *Grotius* (1, 2, 5); *Schorer* (Note 18); *Neostadius* (Obs. 2).

Mr. Juta, Q.C., relied on *Grotius* (1, 5, 20) and *Schorer's* note on that passage.

Cur. ad vult.

Postea (Dec. 12th).

The Court delivered judgment.

De Villiers, C.J.: In this case the Court has granted a decree of separation *a mensa et thoro* at the suit of the wife on the ground that her husband's conduct has been such as to make further cohabitation insupportable to her. Proof was given that shortly after marriage he committed adultery with a relation of hers, but she condoned his offence, which she had only discovered on his own admission, and she did not rely upon his adultery as a ground for obtaining the decree. Proof was also given of two assaults committed on her, but taken by themselves they were not sufficiently serious to justify a decree. The Court was, however, of opinion that his habitual intemperance and the cruel taunts which he used towards her about the woman with whom he had committed adultery constituted, in addition to the assault, such aggravating circumstances as to entitle her to be judicially separated from him. The question then arose whether the plaintiff is further entitled to an order for the cancellation of a promise made by her in their ante-nuptial contract to leave to the defendant one-half of

her property in case of his surviving her. A similar promise in regard to his property was made by the defendant in the same ante-nuptial contract, but the plaintiff is willing to forego her claim to one-half of his property if her promise should be cancelled. A promised gift of this nature, payable on the death of the intended spouse, is known in the Dutch law as a *douarie*. It is singular that the question which has now arisen has never yet been decided in this Court, or even in any of the Dutch Courts. *Bynkershoek* (Burg. Rechtz. book 2, chapter 8), in discussing this question, states that during his forty years' presidency over the High Court of Holland the question was only once raised, but the circumstances of the case rendered a decision unnecessary. It was a case in which the widow of the man from whom she had been judicially separated sought to recover the amount of the *douarie* from his heirs. It appears that the wife had brought the action for judicial separation on the ground of the husband's ill-treatment, but the husband also claimed a separation on a similar ground, and the Court, without deciding which party was to blame, granted the decree. In the subsequent action brought by the wife against the husband's heirs some of the judges held that the contract remained in force notwithstanding the decree, more especially seeing that the husband had not, during his lifetime, sought to cancel the contract. Another opinion held was that judicial separation stands on the same footing as divorce, and that on failure of the consideration on which the promise of a gift was made the promise itself tacitly falls to the ground. A third opinion was that it would have been a good defence for the heirs to prove that the wife was really to blame, but that, in the absence of such proof, the wife was entitled to succeed. The judges who held the first and third opinions being in the majority, judgment was given for the plaintiff. The only proposition, therefore, for which the case can be cited as an authority is that a decree of judicial separation does not *per se* cancel the promises made in favour of the innocent spouse. The question still remains whether the innocent spouse is entitled to an order for the cancellation of his or her promise made to the spouse who is at fault. *Bynkershoek* himself draws a distinction between grave and light matrimonial offences, and expresses the opinion that only a spouse who has been guilty of the former ought to forfeit his or her right to the *douarie*. Whether the offence falls under the one or other class must, he thinks, be left to the discretion of the judge. The discretion seems to me a very dangerous one. What

appears to one judge to be a very grave offence might in the opinion of another be venial, and unless the offences are specified as falling under the one or other class, confusion would soon ensue. My own opinion is that misconduct which is sufficiently serious to justify a decree of judicial separation would also justify an order cancelling any promise still to be performed by the injured spouse. Such a promise must surely be deemed to be conditional upon the promisee fulfilling his implied undertaking so, at least, to conduct himself as not to render married life insupportable to the promisor. In modern practice a decree of judicial separation, when objected to by the defendant, is not granted on light grounds. There have been cases in which the Court has confirmed a voluntary arrangement of separation by a judicial decree and, in such cases, the voluntary arrangement settled all questions of property between the parties. But a decree founded upon the proved misconduct of one of the spouses has frequently been held to justify an enforced separation of property held in community and an interdict restraining the offending husband from administering his wife's half-share. Such misconduct would also entitle the injured spouse, who has been married by ante-nuptial contract, to an order rescinding any ante-nuptial promise which he or she may have made of a gift to take effect on his or her death, but, on the other hand, where mutual promises of this nature have been made by both spouses, the injured spouse who elects to have his or her promise rescinded can only obtain the order subject to a renunciation of the promise made in his or her favour. It is well to observe that there is no question in this case whether a plaintiff in a suit for judicial separation is entitled to a decree forfeiting benefits which have already accrued to the defendant from the marriage. Such a decree is continually granted at the suit of plaintiffs for divorce, but there is an essential distinction between judicial separation and divorce. The former proceeding was wholly unknown to the Roman law. The remedy under that law for conduct which made marriage an intolerable burden was divorce. The introduction of Christianity produced no change in this respect in the Roman empire, but in course of time the ecclesiastical authorities laid down that marriage is a sacrament, and that it cannot be dissolved except by papal dispensation. Some remedy had then to be devised in those countries where the Canon law prevailed for cases—probably quite as numerous then as now—in which the conduct of the one spouse had become so gross, cruel, or licentious, as to make further cohabita-

tion intolerable to the other. The marriage could not be dissolved, but, as a compromise, the canonists invented the decree of separation *a mensa et thoro*, whereby the parties were separated from bed and board, although retaining the nominal *status* of married people. After the Reformation the remedy of divorce *a vinculo matrimonii* was reintroduced in some Protestant countries, including the province of Holland, but it was only granted on the ground of adultery or of malicious desertion. For other grave matrimonial offences which constituted a ground for divorce under the Roman law, the decree of separation *a mensa et thoro* was retained. The effect of a decree of divorce was and still is to rescind the marriage contract altogether, with the result that the innocent party can claim that all benefits already derived or to be derived from the marriage by the guilty party be forfeited. The effect of a decree of separation is not so far-reaching. The marriage remains in force with all its consequences except in so far as any of them may be modified by the decree. Neither party can compel the other to live with him or her, but if no order has been made regarding the property, each party retains his or her rights of property unimpaired. The community of property continues between those who have been married without ante-nuptial contract, unless the Court orders a division of the property and a cessation of the community. Ante-nuptial contracts remain in force unless the Court modifies them so as to suit the altered relations between the parties. But there is not, so far as I am aware, any case on record in which a completed gift has been declared to be forfeited. *Browner*, indeed, in his treatise on the Law of Marriage (2, 29, 17), says that donations made by one spouse to the other are of no effect, and are deemed to be revoked by virtue of a decree of separation, but it is clear that he was not referring to donations made by ante-nuptial contract. The only authorities cited by him are passages from the *Digest*, which could not possibly apply to judicial separation which, as already remarked, was a procedure unknown to the Roman law. In this colony there have been numerous cases in which a division of property has been ordered, but none in which the offending party has been declared to have forfeited any benefits which had already accrued to him or her, either by virtue of community or ante-nuptial contract. We have now to deal with a case in which no benefit can accrue to the offending party until the death of his wife. She has succeeded in obtaining a decree of separation and, while renouncing the benefit of the ante-

nuptial promise made to her, she asks to be released from the corresponding promise made by her to the defendant. For the reasons already given she is, in my opinion, entitled to the order.

Their lordships concurred.

[Plaintiff's Attorneys, Messrs. Findlay & Tait; Defendant's Attorneys, Messrs. Reitz & Herold.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice RUCHANAN, and Sir THOS. CPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

ZEDERBERG AND OTHERS V. ROTH- } 1895.
BART, TRADING AS LEWIS BROS. } Nov. 28th.

Mr. Buchanan applied for the final adjudication of the defendant's estate.

The order was granted.

SHEARD'S TRUSTEES V. VAN RENSBURG.

Mr. Tredgold applied for provisional sentence on a mortgage bond for the sum of £350 with interest, due on a mortgage bond; also for £181 7s. 1d. due on a promissory note.

Sentence was granted as prayed.

ILLIQUID ROLL.

SMITH AND CO. V. NIEUWSTADT.

Mr. Sheil applied for judgment for £24 7s. 4d., less £10 paid on account, with costs of suit.

Judgment was granted as prayed.

JOUBERT V. GERMISHUYS.

Mr. Close applied for judgment for the sum of £45 and costs.

Judgment was granted as prayed.

ADMISSIONS.

Ex parte HAUPTFLEISCH.

Mr. Smuts applied for the admission of Mr. Herbert Charles Halford Hauptfleisch as an attorney and notary of the Supreme Court.

The application was granted, and the oaths duly administered.

Ex parte BOLUS.

Mr. Watermeyer made a similar application on behalf of Mr. Frank Bolus.

The application was granted, and the oath duly administered.

Ex parte CORMACK.

Mr. Close made a similar application on behalf of Mr. Harry Ewan Cormack, the oath to be administered at Aliwal North.

The application was granted.

COMMISSIONERS GREEN POINT AND
SEA POINT MUNICIPALITY V. THE
COLONIAL SECRETARY AND RESI- } 1895.
DENT MAGISTRATE, CAPE TOWN. } Nov. 28th.

Election of Municipal Commissioners—Resident Magistrate—Mandamus—Act 45 of 1892, section 40—Act 5 of 1895—Act 14 of 1859.

The Court refused to grant a mandamus compelling the Resident Magistrate of Cape Town to fix a day, under Act 45 of 1882, section 40, for the election of Councillors for the Municipality of Sea Point, the time having elapsed within which the election should have taken place.

There was an application on notice to the respondents that a petition would be presented praying the Court to order the Resident Magistrate of Cape Town to appoint a day for the first election of Commissioners under section 40 of Act 45 of 1882, or for such other relief in the premises as to the Court might seem fitting.

The petition set forth that the Municipality was constituted under Act 14 of 1859.

That in the last session of Parliament the Municipality was by Act 5 of 1895 brought under the provisions of Act 45 of 1882.

That the Act 5 of 1895 passed the final stage of the Legislative Council on the 18th June. The next morning (the 14th) a letter was sent to the Colonial Secretary stating, *inter alia*, that it was of great importance to the inhabitants to have the Bill proclaimed law as soon as possible and requesting that the Governor might proclaim it early.

That on inquiry subsequently at the Colonial Office as to the promulgation of the Bills of the session in batches, as had sometimes been done, or at all events at the end of the session, and drawing attention to the solicitors' requests contained in the letter, the solicitors were informed that no definite answer could then be

given, but they gathered in a general way that when there were several Bills ready to be proclaimed, this one would also be proclaimed.

That Mr. Van Zyl, who had special charge of the matter, left on Saturday, 22nd June, for up-country and did not return until Thursday, 14th July.

On this latter date Mr. Brown (one of the Commissioners) informed him, that in answer to some remark made by him at a Municipal meeting a couple of days before there appeared that morning a letter in the "Cape Times" calling attention to the fact that the Bill had been proclaimed on the 25th June.

On looking up the "Gazette" this was found to be so, and it was then resolved to discuss the matter at a meeting of the Commissioners to be held on the 9th July. At that meeting it was resolved also to petition the Governor to issue notice as to the number of Commissioners, and the petition was duly signed on the 16th July.

The petition set forth "That it is absolutely necessary and in the interests of the Municipality that Commissioners should be elected under the said Act without any delay, but that the Governor must first proclaim the number" and requesting him to give effect as early as possible to proclaiming the number of Commissioners and that at previous meetings of the ratepayers it was their express wish that the number of Commissioners should be nine.

The petition was duly forwarded to the Colonial Office by letter dated 16th July. In this letter it is said amongst other things 'It is necessary that the Governor proclaim the number to be nine as soon as possible' and attention is drawn to the fact that the Municipality came under the Act of 1882 not by Proclamation but by an Act of Parliament.

Though the letter with the petition was delivered at the Colonial Office before twelve o'clock on the 16th July, no reply or message was sent to it till Thursday the 18th August, when at eleven o'clock that morning was delivered at the office of the attorneys a letter dated the 10th informing them "that the Governor will issue a notice assigning nine Councillors to the Municipality."

This notice appeared in the "Gazette" on the 13th August. It had to appear once a week for three consecutive weeks. The three weeks expired on Tuesday the 3rd September. After that a month must elapse before the Governor can issue the Proclamation. This month expired on Thursday the 3rd October. On the afternoon of that day the attorneys informed the Government that no objection had been

lodged to the number of Commissioners to be assigned. On the 10th October, they received a letter advising them that the Governor would issue a Proclamation assigning nine Councillors to the Municipality. This Proclamation appeared in the "Government Gazette" of the 11th October.

On the 24th October, they received a letter from the Colonial Office stating that the Magistrate had been advised that he could not hold the meeting for the nomination of the Commissioners as the time had elapsed within which the election should have taken place.

To this a reply was sent pointing out that *no election could be held until the Governor had proclaimed the number of Councillors.*

The petitioners alleged that if the contention of the Government were correct that section 40 of the Act of 1882 as to the constitution of the Municipality counts from the day of the promulgation of the Act (25th June) and not from the day of the promulgation of the Proclamation as to the number of Commissioners (11th October) then the three months referred to in that section expired on the 25th September. On the other hand, if the three months are to be counted from the day of the promulgation of the Proclamation (11th October) then the time expires on the 11th January next. That no election of new Commissioners could be held until the Governor should have proclaimed the number.

The petitioners prayed:

(a) That the Court might be pleased to order the Resident Magistrate of Cape Town to appoint a day for the first election under section 40 of Act 45 of 1882, or,

(b) For such further or other relief in the premises as to the Court might seem fitting.

No answering affidavits were filed by either of the respondents.

Mr. Rose-Innes, Q.C., and Mr. Searle, Q.C., for the applicants.

Mr. Giddy for the respondents.

The Court made no order on the application.

The Chief Justice said: Under the Act No. 5 of 1895 it was declared that the said municipality, that is, the new municipality created under the Act, is constituted under the provisions of the said Act. By the 4th section of Act No. 45 of 1882, it is provided that the first election of Councillors in any municipality shall be held on such a day within three months after the constitution thereof as the Resident Magistrate of the district may appoint. The Act No. 5 of 1895 was promulgated on the 25th June, 1895, and clearly, therefore, on that day the Municipality was constituted. After the three months had expired the Magistrate

was requested to call a meeting for the purpose of electing Councillors. The Magistrate then took up the position that the three months provided for under the 40th section of the Act having expired, he had no power to act; and the Court is now asked to make an order compelling the Magistrate to call a meeting. Now, without expressing any opinion at this stage as to whether this 40th section may not be read as directory, I am clearly of opinion that if there is some other means of escaping out of the difficulty, the Magistrate ought not to be ordered by a *mandamus* to call this meeting. He simply observed the provisions of the 40th section; the three months had expired, and he could not therefore, within the three months provided for, call a meeting. It would certainly be a very strong step on the part of this Court, if there are any other means of carrying on the Municipality, to compel the Magistrate now to call a meeting. The next question is whether the difficulty of carrying on the Municipality is really so great as is imagined. In my opinion the difficulty is not so great, and the affairs of the Municipality can be carried on perfectly legally until August of next year (1896). The 4th section of Act 5 of 1895 provides that "pending the election of Councillors under this Act the Commissioners at present holding office shall continue to hold office, and shall exercise and possess all the powers and authorities now exercised or possessed by them." Among the powers and authorities exercised by them at the time of the passing of this Act was the power of levying rates. That power is given to them by the 32nd section of the original Act No. 14 of 1859—which provides that "The rates to be levied by virtue of this Act shall become due and be payable within fourteen days after the same shall have been assessed in manner aforesaid, and it shall and may be lawful for the said Commissioners to appoint a collector for the purpose of collecting the amounts due and payable upon the property so assessed; and the said collector is hereby authorised to demand and receive the amount so to be collected. Provided always that the said collector shall be furnished with an order under the hands of the said Commissioners, or any two of them, directing the said collector to levy the amount mentioned in the said order, and provided also that the said order shall specify the rate in the £ at which the sum mentioned therein shall be computed." Clearly, therefore, the power and duty of levying rates is conferred and imposed on the Commissioners. Then, the 31st section defines how that power is to be exercised. It provides "that it shall be lawful for the Commissioners, when they shall see fit, and they are hereby required,

upon a requisition made to them in writing to that effect, by any number of householders of the said municipality not less than ten, to call a meeting of such householders for the purpose of assessing any such rate or rates." The duty of the householders is to assess a rate, but even under the Act of 1859 the householders might refuse to exercise that power, and they may refuse to exercise it now; but in my opinion if they exercise the power then the rate so assessed becomes perfectly legal, because it is to be levied by the Commissioners in the exercise of the power granted them by the section. In my opinion, therefore, the present Commissioners may remain in office until August, 1896, when a fresh election takes place, and meanwhile may exercise all the powers which they exercised before; all those powers which are incidental to their former powers, and amongst those powers the calling of ratepayers to a meeting for the purpose of assessing rates is one. If ratepayers do so meet together for the purpose of assessing a rate, then the rate may legally be imposed by the Commissioners. That being my view, I do not feel justified in ordering the Magistrate to call a meeting after the time within which he is authorised by the Act to call such a meeting. There will be no order on the present application. The question of costs does not arise.

Their lordships concurred.

[Applicants' Attorneys, Messrs. Van Zyl & Buissinné; Respondents' Attorneys, Messrs. J. & H. Reid & Nephew.]

WOLFF V. PICKERING. } 1895.
Nov. 28th.

Sale and purchase—Breach of contract—
Failure of consideration—Repudiation of
contract—Rescission of sale—Damages.

The purchaser of shares paid the price but did not receive delivery in due time.

He did not thereupon repudiate the contract or claim a rescission of the sale on the ground of failure of consideration, but entered into negotiations with the seller for payment of damages caused by the seller's failure to deliver the shares.

Five years afterwards he brought an action for damages for breach of contract, including in such action a claim to recover the price.

Between the date when the shares ought to have been delivered and the date of the action, both dates inclusive, the shares were unsaleable.

Held, that the measure of damages for breach of contract was the difference between the price paid and the highest market price, but that, as the shares were unsaleable between these dates, no substantial damages were claimable.

Held, further, that if the plaintiff had repudiated the contract on the defendant's failure to deliver in due time he would have been entitled to claim a rescission of the contract and a return of the price, but that having treated the sale as still subsisting and entitling him to the benefits of a rise he must elect whether he would accept the scrip which had been tendered by the defendant or claim the damages.

This was an action instituted by Victor Wolff, of Johannesburg, to recover the sum of £250 18s., and £500 damages.

The declaration alleged that on the 9th December, 1889, the defendant sold, and one Henry Adler bought for £250 18s., half of one share of £500 held by the defendant in a certain syndicate, known as the Koffyfontein Central Syndicate.

That Adler paid the said sum in terms of the memorandum of agreement of sale and purchase (copy of the memorandum and annexures were set forth).

Thereafter the plaintiff purchased and acquired from the said Adler and took cession of all his right, title, and interest in respect of the said share under the said agreement, of all which the defendant had notice.

In September, 1890, certain shares or scrip were issued in respect of syndicate shares in the said syndicate, and the defendant, or others authorised by him, received the shares or scrip accruing to the half of the syndicate share so acquired by him as aforesaid, and it became and was the duty of the defendant under the said agreement to deliver the said shares or scrip so received to the plaintiff.

Notwithstanding the premises, the defendant did not so deliver the said shares or scrip, but broke his agreement aforesaid, which thereupon became and is of no force or effect. That by reason of the defendant's breach of the said agreement the plaintiff is entitled to claim and recover from the defendant the sum of £250 15s., being the amount so paid to and received by the defendant from the said Adler, together with interest from the 9th December, 1889, and also

to claim and recover from the defendant the further sum of £500 as and for special damages sustained by him, in that he was by such breach debarred from concluding a sale at a profit of £500 of his interest in the said syndicate share of the shares or scrip aforesaid, but the defendant, after lawful demand, refuses to pay either of the aforesaid sums or any part thereof.

The plaintiff claimed :

(a) The sum of £250 18s., with interest from the 9th December, 1889.

(b) The sum of £500 as and for damages as aforesaid. He tendering to deliver to the defendant all his rights as to the said half of the said syndicate share.

(c) Alternative relief and costs.

The defendant in his plea admitted that in 1892 he had notice that the plaintiff had acquired some interest in the purchase made by Adler.

He said that in the early part of 1890 he tendered to Adler a due and separate certificate of the half in the said syndicate share which he had purchased. But Adler did not accept the said certificate, but requested the defendant to retain it until such time as Adler might require delivery of it, and this the defendant consented to do.

That thereafter Adler did demand from the defendant delivery of the said half share. The defendant was unable at the date of the demand to make delivery, and he so informed Adler. But since the issue of scrip in respect of the said half share, he has always been and still is ready and willing to deliver such scrip to Adler, or to the plaintiff as his cessionary.

He denied that the agreement between himself and Adler had come to an end, or that he was guilty of any breach. He admitted that he did not carry out the terms of the contract of sale by timeously delivering the half syndicate share to Adler, but he said that the sum of £50 was more than sufficient to cover any damage sustained by Adler by the said breach of contract.

The shares issued by the Koffyfontein Central Company in respect of the half syndicate share purchased by Adler amounted to fifty in number, and the defendant is ready and willing, and before action tendered, and hereby again tenders to deliver to the plaintiff, as the cessionary of Adler, scrip for fifty Koffyfontein Central shares, and to give him £50 as and for damages.

Replication general.

Mr. Searle, Q.C., and Mr. Graham for the plaintiff.

Mr. Innes, Q.C., and Mr. Molteno for the defendant.

The memorandum of agreement entered into

between the defendant and Adler was in the following terms :

MEMORANDUM.

From E. Pickering,
Johannesburg.
9th December, 1889.

To Henry Adler, Esq.,
Johannesburg.

Received the sum of £250 18s. from Mr. Henry Adler, being purchase money for half of one share of £500 in the Koffyfontein Central Syndicate held by me under receipt from the Hon. Secretary C. J. Roberts of which a copy is attached hereto, the said interest to entitle the said Henry Adler to a full half-share of any and all profits accruing unto me out of the original share and I engage hereby to hand such profit of whatever nature such may be either in shares, or cash, or any other form to Mr. Henry Adler, immediately after receipt thereof.

(Signed) E. PICKERING.

Endorsed, HENRY ADLER.

COPY.

Kimberley,
3rd December, 1889.

£1,000.

Received from Mr. E. Pickering per Mr. J. W. Philip of Kimberley the sum of one thousand pounds sterling, being in payment of (2) two shares of £500 each in the Koffyfontein Central Syndicate.

For Koffyfontein Central Syndicate.

(Signed) C. J. ROBERTS,

No. 12. Hon. Secretary.

Mr. Victor Wolff, the plaintiff, deposed that in December, 1889, Mr. Henry Adler bought a quarter interest in a £1,000 share in the Koffyfontein Syndicate from the defendant. He (witness) purchased half of the quarter share from Adler, and one Lilienfeld also bought a quarter interest from defendant. As to registration, it was agreed that after Lilienfeld had registered his interest the share should be given to Adler, so that his interest might in turn be registered. The original scrip, however, never came back into Adler's hands. A few months afterwards he (witness) took over Adler's interest in the share, and received a document from Adler endorsed by Pickering, which had been in his (witness's) possession ever since. He (witness) then became possessed of a quarter of a £1,000 share. Shortly afterwards he made an effort to sell his interest through Adler. The broker was Gustav Oppenheimer, and it was sold for £300, for which amount a cheque was given to Adler. The sale did not go through, however, as the documents were not in order,

and the cheque was returned by Adler to Oppenheimer. They wanted the secretary of the syndicate's scrip, not Mr. Pickering's. He pressed Adler to get a proper document, and Adler communicated with the defendant, who had left for Port Elizabeth. In 1892 he (witness) went to Port Elizabeth, and endeavoured to get a settlement. He sent a letter of demand in Adler's name. He and defendant came to an amicable settlement in 1893, by which the defendant agreed to pay £20 a month. He never repudiated liability. Meanwhile he was pressing Adler as well, but could not get anything out of anybody. He only wanted his money back, and did not press the defendant for any damages. On the 16th October, 1894, the defendant tendered the scrip and £50 damages, and he refused it. He had not brought an action before, because he was anxious not to go to law if it could be avoided.

Cross-examined by Mr. Innes: Virtually it was a joint purchase by Adler, half for himself and half for witness. He paid £125 9s. to Adler, and thus acquired the quarter interest in the £1,000 share. When Oppenheimer said he thought he could sell it, he (witness) acquiesced, but as a man of business he thought the purchaser would not take Pickering's receipt, but would require the secretary's formal document. However, he tried it on, as there was no harm in trying.

By the Court: Before the incident of Oppenheimer trying to sell, he had been trying to get something more negotiable from Pickering. He only considered the document a temporary receipt for the money.

He had never heard of any sales having been effected.

Evidence taken on commission was read, and this closed the plaintiff's case.

Mr. Edward Pickering, the defendant, deposed that in 1889 he owned a £1,000 share in the Koffyfontein Central Syndicate. He sold three-quarters of the interest in the share and retained the remaining quarter. He in February, 1890, obtained the split certificates and tendered one quarter share to Adler, who had purchased a quarter. Adler would not accept it, but on the following September he demanded the certificate. Witness had, however, by that time pledged the certificate with the Cape of Good Hope Bank.

Cross-examined: The first tender of either script or money he had been able to make was in May, 1894. He made a compromise in May, 1891, at a time when his liabilities were about £46,000, and in his schedule he put forward that he owed Adler this £250. He intended that to mean that it was claimed. Neither

Wolff nor Adler told him the truth as to what they could have obtained for the share, or he believed it would have been paid. He never doubted the statement that they could get £300 for the quarter share, or he would not have offered to pay off so much a month or given any promises of payment at all. He never had control over the shares after they had been pledged with the bank (the Cape of Good Hope Bank), but twelve months ago he bought the quarter share from the bank for the nominal price of £10, in order to tender it to Adler.

By the Court: He only recently heard that Wolff had bought Adler's interest, as Wolff, in pressing him for payment, always did so as though he were acting for Adler. He (witness) paid £1,000 for the £1,000 share, so that he made no profit. He offered to pay so much a month, because he believed the plaintiff's statement that he could have sold the quarter share (which he unfortunately had been unable to deliver owing to its being pledged to the bank) for £200.

Evidence taken on commission was read.

The defendant (recalled) said that he never had information from Adler that he could sell the share if he (witness) would send the proper documents.

Mr. Searle was heard for the plaintiff.

Mr. Innes was not called upon.

Judgment was delivered for the plaintiff for £50, the amount of the defendant's tender, with costs up to the date of tender, the plaintiff to pay all costs subsequent to the date of tender.

De Villiers, C.J.: This is an action for damages for breach of contract, and three questions are: (1) What was the contract? (2) Was there a breach as alleged by the plaintiff? (3) If there was a breach what damages has the plaintiff sustained? The contract is set forth in the declaration. It was a contract by which on the 9th December, 1889, the defendant sold and one Adler bought for £250 18s. half a share in the Koffyfontein Central Syndicate. The price was paid by Adler who ceded his rights to the plaintiff. The breach alleged in the declaration that is although in September, 1890, certificates of shares were delivered to the defendant he failed to deliver such certificates to the plaintiff. The damages claimed are first the sum of £250 18s. paid by Adler to the defendant, and secondly the sum of £500 as special damages sustained by the plaintiff in having been debarred by reason of the non-delivery of the shares from selling his interest in the syndicate at a profit of £500. The defendant in his plea tenders the scrip received by him, and the further sum of £50 as damages for his delay. For the purposes of this case I will assume that the plaintiff has acquired all

Adler's rights of action against the defendant, and that the contract and breach thereof have been proved as alleged. But it has also been proved that between September, 1890, when the shares were delivered to the defendant, up to the present time they have been wholly unsaleable. What then should be the measure of damages? The plaintiff says that he sold his interest in the syndicate before September, 1890, for £300 and that, owing to the papers given by the defendant to Adler not being in order, the sale did not go through, but the plaintiff admits that in September, 1890, he was prepared to accept the shares from the defendant and indeed that he pressed him for the shares. It is the non-delivery of these shares in September, 1890, that is relied upon as constituting the breach of contract, and therefore a profit which could have been made before that date, cannot enter into the calculation of damages. If there had been evidence that the shares were saleable at any price after that date the price which he could have so obtained, if he had the scrip, would have been the measure of damages for the non-delivery of the scrip in due time. As Adler had paid the purchase price I am of opinion that he is entitled to the highest price for which the shares could have been sold between September, 1890, and the present time, after deducting such purchase price, but in fact the shares were unsaleable at any price during that time. According to this calculation, therefore, no substantial damages are claimable. In addition, however, to damages so calculated the plaintiff claims the price which Adler has paid for his rights. If the plaintiff, upon the defendant's failure to deliver the scrip in due time, had repudiated the contract altogether and claimed back the price he would, in my opinion, have been entitled to succeed. But he elected to treat the contract as still in force, with the result that he would have the benefit of a rise in the market price of the shares thereafter. It is too late, therefore, now for him to claim the price on the ground of failure of consideration. The defendant has tendered the scrip, and the plaintiff must now elect whether he will take the scrip or claim as damages the difference between the price actually paid and the highest market price after the date of such payment. The defendant has tendered not only the scrip but the sum of £50 as damages, and, as he still abides by his tender, judgment must be given accordingly with costs up to the date of tender, but the subsequent costs must be paid by the plaintiff.

Mr. Justice Buchanan concurred.

Mr. Justice Upington: I also concur, although

I do not approve of two acts of the defendant; the one in dealing with the share certificate and then pledging it to the bank, and the other, the manner in which he prepared his statement of liability for the Cape of Good Hope Bank.

Mr. Innes applied for the defendant's witnesses' expenses.

The Chief Justice said: The conduct of the defendant on the two points mentioned was by no means to be approved of, and under all the circumstances the Court is not inclined to allow his expenses as a witness.

[Plaintiff's Attorney, Gus. Trollip; Defendant's Attorneys, Messrs. Van Zyl & Buissinné.]

ALI WAL NORTH BOARD OF EXECUTORS, IN LIQUIDATION V. GREATHEAD. { 1895.
Nov. 29th.
Dec. 5th.

Auditor—Company—Trust deed—Companies Act, 1892—Balance sheet and accounts—Unauthorised speculation—Damages.

The trust deed of a company, not formed under the Companies Act, 1892, provided that the directors shall lay before the shareholders annually a balance sheet "together with any report of the auditors thereon," and that "it shall be the duty of the auditors to examine the books of account and the vouchers belonging thereto, at least once in every six months, and to certify to their finding."

The auditors examined the books and vouchers and certified to their finding, but they never submitted any other report to the shareholders.

Held, in an action by the official liquidator of the company against one of the auditors to recover as damages the loss sustained by the shareholders by reason of the directors' unauthorised speculations during his term of office, that as he had performed the duty required of him by the trust deed he could not be held liable, as he would have been if the regulations appended to the Companies Act, 1892, had applied.

This was an action for £800 damages instituted by the official liquidator of the company against the defendant, who was one of the auditors.

The declaration alleged that the company was registered with limited liability, and carried on business at Aliwal North; the deed of settlement dated May 25, 1882, subsequently amended on

November 8, 1889, provided for the management of its affairs. The company was carried on until July 5, 1892, when on account of its being involved in financial difficulties and being unable to pay its debts through losses sustained, it was resolved by a majority of shareholders present at a special general meeting to liquidate the company. Thereafter the company was placed under liquidation by order of the Supreme Court dated February 28, 1893, and the plaintiff (Mr. C. A. Schweizer) was appointed liquidator.

The company is now in liquidation, and an amount of £4,500, being £4 10s. on each share, has been called up to meet its liabilities.

The losses sustained by the company were due to the mismanagement of its affairs by the directors and managers, who entered upon speculations in shares and otherwise with money belonging to the company, which speculations in shares were not authorised by the deed of settlement or amendments thereto; the speculations resulted in losses to the company of large sums of money. During the years 1888 to 1891 and part of 1892 inclusive, the said unauthorised speculations were being conducted. The defendant was, during the said years, one of the auditors of the company, and it was his duty as such to have examined the books, accounts, and vouchers of the company, and to have reported thereon. If the defendant had performed the said duties, the said unauthorised and illegal speculations would have been brought to the notice of shareholders and would have been stopped, the dividends which were awarded in the said years would not have been awarded, and the losses which the company sustained would have been avoided.

The defendant failed in his duty in the above respect, and neglected to bring the said matters to the shareholders' notice, and by the misconduct, negligence, and default of the defendant as auditor, the company has sustained damage in the sum of £800, which sum has been demanded from the defendant, but he refuses to pay the same, or any portion thereof.

The plaintiff claimed the sum of £800 as damages, alternative relief, and costs.

The defendant, after admitting the formal allegations in the declaration, specially pleaded that he was an auditor and shareholder of the company from 30th June, 1888, to 30th June, 1891, and he admitted that from time to time during that period certain unauthorised speculations were conducted, as alleged, although he was not aware of the fact at the time. He said that it was his duty under the trust deed to examine periodically the books of account of the company and the vouchers belonging thereto, and that he duly performed that

duty. He denied that it was his duty further to inquire into the validity of the directors' transactions, and he said that he was not allowed by the directors to examine their investments, and he specially denied the allegations of negligence, &c., alleged against him. He admitted the demand of £800 and his refusal to pay it, and he said that any loss caused to the company by the illegal transactions of the directors could have been recovered by the plaintiff from the directors, and that it was and is his duty so to recover it.

The replication was general, and issue was joined on these pleadings.

Mr. Searle, Q.C., and Mr. Molteno for the plaintiff.

Mr. Rose-Innes, Q.C., and Mr. Watermeyer for the defendant.

Mr. Constantine Alexander Schweizer, the official liquidator of the Aliwal Board of Executors, and the plaintiff, deposed that he had drawn up certain reports regarding the affairs of the company. It carried on a trust and agency business from 1882 to 1885, in which year they went into a wider sphere than authorised by the trust deed by purchasing £1,600 worth of 6 per cent. mortgage bonds, the money being borrowed at 7½ per cent. from the Bank of Africa. The ultimate net loss on that transaction was £560. In 1886 the Board speculated in shares on money borrowed from the bank, and in 1887 an investment account was opened in the books and syndicates were floated. The total losses sustained by the Board amounted to £4,281, of which £2,801 was on account of share transactions and £1,479 on bonds. In June, 1889, 1890, and June, 1891, when the company paid dividends, it was insolvent. The transactions of the company showed a loss. Certain fees were paid out to the directors in June, 1889, and dividends declared, and at that time assets shown by the company were not assets at all. "Bonds and other investments" were given as assets, £3,475. The debit balance was brought up as an asset, and the shares held were supposed to be of the value represented. He had had the market value of the shares computed in June, 1889, as £825 11s. 2d., while according to the statements issued they were worth £1,035 7s. 1d., and the account of "Bonds and investments" issued in June, 1889, should have shown a loss instead of a profit. At the end of June, 1890, the shares were given as being worth £1,349 1s. 6d., while the actual market value was only £261 2s. 1d. The statement issued should, therefore, have shown a loss, but instead of that it showed a profit, and a dividend was declared of 8 per cent. The same method was adopted through-

out, the market value of the shares been ignored. The auditors received in fees five guineas each annually. One of the auditors was a director, this being contrary to the trust deed. Three directors paid up sums amounting in all to £2,450: Levy paid £900; Greenslade, £900, and Knight, £650. That was by way of compromise. Part of the compromise was that the directors and some of their connections relinquished certain claims. As to Levy, he (witness) had satisfied himself that he could not pay any more; Greenslade also, he thought, could not pay more, the other two directors had gone to the Transvaal, and he was trying to get at them. He had tried to get them arrested, but there were legal difficulties in the way. The losses were on shares purchased after 1889. As far as actual figures were concerned the books were accurately kept and the statements issued agreed with them.

Cross-examined: The auditor in his opinion should have examined the list of investments himself and valued them accordingly, and seen whether the amount brought forward from year to year was correct. The auditor should have reported if he found that the Board was entering into investments contrary to their powers in the trust deed. The auditor should have known that the balance brought forward in the assets was more than the actual value of the shares. He thought an auditor should know the actual value. The shareholders living in Aliwal North were cognisant, he thought, of these transactions. Greathead, the defendant, became the auditor in 1889, and audited the accounts from June, 1888, up to the time of liquidation. He (witness) had found there were losses on the valid transactions since then, as well as those entered into contrary to the trust deed. The company was conducted in an extraordinary manner. At one time there were no directors at all, and a special meeting of shareholders was called, at which the manager was authorised to do as he liked practically, and two trustees (Levy and Knight) were appointed.

Re-examined: It was impossible to show how the company stood without ascertaining the proper value of the shares held. In 1889 the Board of Directors transferred to the manager (Mr. Jefferson) 500 shares which the manager never paid for, and in addition to that the manager had overdrawn his account with the company at that time to the extent of £218. Eventually the manager's overdrawn account came to over £400. The bulk of the shareholders did not live in Aliwal North, and proceedings in fact were taken by those living outside Aliwal North.

By the Court: If the defendant had done his

duty and reported that illegal investments were being entered into, the subsequent losses might have been averted, as the shareholders would have put a stop to them in 1889 had they known that a loss was made. The two directors who left for the Transvaal were named Bilbrough and Boss. They left Aliwal in 1888. He had done his utmost to recover what he could from the directors.

This closed the case for the plaintiff.

Daniel Charles R. Greathead, the defendant, said he held forty-one shares in the company. At the formation of the company in 1882, he was appointed auditor, and remained so until 1885, when he relinquished the post. In 1888 he was asked by the directors to resume, and he did so, and remained auditor until the liquidation. He looked through all the books, and examined the entries and figures, and what receipts and papers were there were also examined. He did not examine the securities themselves, as he thought the directors responsible for those. He first had notice of a demand against him in February of the present year.

Cross-examined: He took a great interest in the company from its inception. According to the minutes he was the mover of the resolution which placed 500 shares in the manager's hands. That was in 1889. He audited from 1882 to 1885, during which time an ordinary agency business was carried on. The auditors in 1888 went away, and witness was then asked to resume auditing. He was then aware that the company had gone in for share transactions. He was acquainted more or less with the provisions of the trust deed. He knew that these speculations of the company were not authorised. He did not examine the scrip held. He knew the mode in which the share account had been kept. The debit balance on account of shares was brought forward as an asset in the balance-sheet, and such amount was assumed to be the value of the shares. He did not make any effort to ascertain the value of the shares, nor even that the scrip was there at all or not. He had certified in the balance-sheet that the company had made profits, but he did not think it was his duty to see whether the shares were represented at their proper value; it was the manager's duty. Privately he dealt in shares himself, and he knew there was a very great decline in shares in 1889. In June, 1892, consequent on a report made by him that the company was in a hopelessly insolvent condition, liquidation was decided on. No one ever refused to give him information, but when he asked the secretary about the investments he was referred to the trust deed, where his duties as

auditor were defined, and he therefore did not go into the matter of the investments. He thought he had sufficiently discharged his duties if the figures in the books were correct.

Re-examined: Regarding the resolution moved by him in 1889, a quorum of directors was unavailable, and the amendment of the trust deed took place, giving powers to the manager, and appointing two trustees. He signed the declaration under section 53 of the trust deed.

By the Court: In the balance-sheets issued a profit was shown and dividends paid. In 1891 a profit was shown, he assuming that everything was all right. He did not see from the books that any depreciation in the value of shares had been allowed for, but he thought it was the directors' duty to see to such matters.

Mr. Searle, Q.C., for the plaintiff: The important question at issue in this case is what are the duties of auditors of companies. Clearly their duties require something more than the addition of a few columns of figures, a task which might be performed by any schoolboy of average intelligence. See Schedule "A," English Companies Act, 1879. The defendant's duties must be gathered from the trust deed. The 60th and 62nd sections of the trust deed imply that the balance sheet shall be supplemented by the auditors' report, which should bring to the notice of shareholders any irregularities on the part of the directors. The duty of auditors is to keep a check on the directors and to show the position of the company, a mere mathematical accuracy on their part is not sufficient. See *Leeds Estate Co. v. Shepherd* (36 Ch. Div., 787); *The London General Bank Case*: "The Reports" (August, 1895); *Spackman v. Erans* (L.R., 3; H. of L.R. and J., 171). See also *Storey on Agency* (section 217c).

It is submitted that the defendant did not carry out his duties and that he is liable for the loss which resulted from his negligence.

Mr. Rose-Innes, Q.C., for the defendant: To succeed the plaintiff must show (1) breach of duty on the part of the defendant and (2) damages resulting therefrom. There is no magic in the name of auditor; he is simply a person who checks accounts. They may be checked in various ways; by merely verifying the additions, by seeing that the entries have been rightly posted from one book to another, by comparing the receipts and payments with their original vouchers, or by going into the merits of the accounts, valuing the securities, probing the transactions, and seeing that all the articles of association have been complied with,

The check may vary from one extreme to the other, and apart from Statute will be what shareholders choose to make it.

The duties of an auditor can only spring from one of two sources: (a) from the provisions of the Statute law, or (b) from contract with the shareholders. That division is exhaustive, on no other ground can any duty be based.

The Statute law imposes no duty on the defendant. This case must be decided under the old Companies Acts which make no mention of the duties of auditors. By section 93; 3rd Schedule Table A of the Act 25 of 1892 certain duties are imposed on auditors, but even that schedule need not be adopted. Nor have we in our Act the provisions of the English Act of 1879 applicable to banking companies. That was because stringent provisions had already been made for inspecting banking accounts by Act 6 of 1891. So that as far as this case is concerned the Statute law has not imposed any duty on the defendant. He can therefore only be liable, if at all, under his contract with shareholders. That contract is contained in section 62 of the trust deed. His duties under that section are merely to examine the books of account and vouchers and to certify to their finding. There is no obligation on him to report on the balance-sheet. All the auditor has to do is to say, "I have examined the books and vouchers and find that they do or do not agree." The trust deed requires nothing more.

In this respect the present case differs from the English cases which have been cited. In the *Leeds Case* the articles required that the auditor should ascertain the correctness of the balance-sheet and should expressly report whether it was full and fair and exhibited a correct view of the state of the company's affairs. Moreover the balance-sheet was in the form prescribed (see Buckley p. 523). An auditor who takes a balance-sheet in that form and specially reports on it has an onerous task to perform, and hence the Court held that such an auditor must not confine himself to the mere arithmetical accuracy of the balance-sheet. But there are no similar provisions in the present case.

In the *London General Bank Case* there were in addition to the articles of association express statutory provisions (see Buckley, p. 591). Besides, that was an application under the summary provisions of the Act of 1890 or section 165 of the Act of 1862, and see section 209 of the Act of 1892 and section 47 of Act 12 of 1868.

In the present case there was no misfeasance or breach of trust. For the meaning of these words see case of *Canadian Land Co.* (14 Ch.

Div., 660). It cannot be held that the defendant has been guilty of a breach of trust or that he has not performed his duty under the contract. He examined the books, traced the entries, looked through the vouchers and certified that the figures agreed with the figures in the ledger. It is submitted that this was sufficient. It is suggested that he represented the investments to be legal investments. But he did not nor was he bound to do so. *Spackman v. Evans* (3 H. of L.E. and J., App. at p. 236). It has also been suggested that he should have valued the securities. But where is that duty cast upon him? None of the English cases go so far as that. Take the example of the Standard Bank, the Mutual or the Board of Executors, would any of these institutions allow their securities to be valued under a trust deed of this kind? It is therefore submitted that there was no breach and consequently no resulting damage.

Mr. Searle, Q.C., replied.

De Villiers, C.J.: It is important to observe at the outset that this action is not founded on delict but on contract. It is not an action for damages resulting from false and fraudulent misrepresentation of the company's assets. In such an action the evidence given in the present case would have been important, but it would not have been sufficient to establish the plaintiff's case. Mr. Searle has candidly stated that the action is brought for the breach of a legal duty arising out of a contract between the defendant and the company of which the plaintiff is the official liquidator. The terms of that contract must be gathered from the trust deed of the company. In order to ascertain what the duties of the defendant, as auditor, were, the Court must construe the trust deed by the light of the common law of this colony, and not by the light of former English Statutes or later Colonial Statutes. The only sections of the trust deed which bear upon the duties of the auditors are the 60th and the 62nd. The 60th section directs the directors to lay before the shareholders, at every annual general meeting, a balance-sheet, together with any report of the auditors thereon. The 62nd section directs "that two of the shareholders of the company, not being directors, shall be auditors, whose duty it shall be to examine the books of account of the company and the vouchers belonging thereto, at least once in every six months, and to certify to their finding." The declaration alleges that during the years 1888 to 1891, and part of 1892 inclusive, certain unauthorised speculations resulting in losses to the company were carried on, that the defendant was during the said years one of the auditors, that it was his duty as such to examine the books,

accounts, and vouchers of the company and report thereon, and that if he had done his duty the unauthorised speculations would have been brought to the notice of the shareholders and the losses would have been avoided. But the only duty cast upon the auditors by the trust deed is to examine the books and vouchers and certify to their finding. They may report upon the balance-sheet and accounts, but they are not bound to do more than certify to their finding as to the correctness of the books and vouchers. If the trust deed had contained a clause such as the 93rd regulation of the 3rd schedule of the Companies Act, 1892, the liability of the defendant would have been undoubted. It would have been his duty to report to the members upon the balance-sheet and accounts and to state whether, in his opinion, the balance-sheet is a full and fair balance-sheet and properly drawn up so as to exhibit a true and correct view of the company's affairs. Unfortunately this regulation is only applicable to companies formed under the Act of 1892, in so far as their articles do not exclude or modify the regulations. Two English cases have been relied upon on behalf of the plaintiff but they afford no assistance in the decision of the present case. The liability of the auditors was founded upon the terms of a trust deed and an Act of Parliament which closely resemble the regulations mentioned but differ entirely from the trust deed now under consideration. I repeat that if fraud had been alleged and proved against the defendant he would not have escaped liability, but upon the pleadings and evidence before the Court judgment must be given for the defendant with costs.

Mr. Justice Buchanan: In concurring with this judgment, I would point out that it is based solely on the narrow duty which is imposed by section 62 of the trust deed on the auditors of this company. It must be borne in mind that the new Companies Act now in force has provisions which are much more stringent and which impose much more important duties on auditors. The trust deed in this case makes the audit practically valueless, but the new Companies Act will make the certificate of an auditor something of value. In this case, as already pointed out, we are reduced to the contract between the auditor and the company, and by that contract the duties imposed are perfunctory, and they have been most perfunctorily performed in this case.

Mr. Justice Upington: If there had been any liability on the defendant to certify to the true financial position of the company, I should have no difficulty whatever in holding him

liable, but it is clear that there is no such liability imposed upon him under the trust deed.

[Plaintiff's Attorneys, Messrs. Fairbridge, Aiderne & Lawton; Defendant's Attorneys, Messrs. Sauer & Standen.]

GOTTLIEB V. GRIMBEEK. { 1895.
Nov. 29th.
Dec. 4th.

Breach of contract—Onus—Absolution.

Absolution from the instance granted in an action for damages for breach of contract where the plaintiff had failed to prove that a concluded contract had been entered into between his agent and the defendant.

This was an action for £100 damages instituted by Frederick Gottlieb, a trader and general dealer residing at Fraserburg-road, against Hendrik P. J. Grimbeek, a farmer residing at Grootfontein, in the district of Beaufort West.

The declaration alleged that on the 27th September, 1895, the plaintiff, through one William Arthur Stone, who was acting as his duly authorised agent, purchased from the defendant, who sold to him, seventy-three bales of wool, consisting of sixty-four bales of fine wool, eight bales of belly wool, and one bale of locks.

The said wool was purchased at 4½d. per lb. for the fine wool, and 3d. per lb. for the belly wool, no charge being made for the locks. The said wool to be delivered by the defendant to the plaintiff at Fraserburg-road, and to be paid for there.

The plaintiff has in all respects carried out his part of the said contract, and duly offered and tendered to pay the defendant the purchase price of the said wool; but the defendant wrongfully and unlawfully refused to make delivery of the said wool and repudiated his said contract, and resold and delivered the said wool to other persons. By reason of the wrongful and unlawful act of the defendant, the plaintiff has been deprived of the profit which he would have made upon the said wool and has otherwise suffered damage in the sum of £100.

The plaintiff claimed £100 damages for breach of contract and costs.

The defendant specially pleaded that on the 27th September, 1895, at Fraserburg-road station, negotiations did take place between one Stone and the defendant respecting the purchase of certain wool then in the defendant's possession; but he said that no complete and concluded contract for the sale of the said wool was ever entered into between the said Stone and him.

Wherefore he prayed that the plaintiff's claim might be dismissed with costs.

Issue was joined on the replication which was general.

Mr. Rose-Innes, Q.C., and Mr. Tredgold appeared for the plaintiff.

Mr. Graham and Mr. Sheil for the defendant.

Mr. W. A. Stone deposed that he was at present employed as a barman at the Fraserburg-road Station. On the 27th September last, acting as the agent for Gottlieb, he purchased from the defendant 72 bales of wool at 4½d. per lb. for fine wool, 3d. for belly, the locks to be thrown in.

After ascertaining that the defendant was willing to sell his wool, witness sent the following telegram to Gottlieb which was dictated by Grimbeek:

Fraserburg Road, 27th Sept. 1895.

(11.15 a.m.)

From Stone To Gottlieb.

"Seventy-two bales here, Grimbeek, belly and locks separate, wire price and instructions."

To this he received the following reply from Gottlieb:

"Wire sharp lowest price, long, short, belly, locks separate, or all round, except locks, anxious to buy."

He showed this wire to Grimbeek and having learned his price sent the following wire to Gottlieb:

"Four-and-half all round, twenty-three bales eighteen months, growth, eight belly 3d., locks thrown in."

He then received the following wire from Gottlieb:

"Accept according your telegram, load wool at once. Arrive Sunday with money. Reply sharp if loading."

He showed this wire to Grimbeek and considering that the sale had been concluded he sent the following wire to Gottlieb:

"Loading, prices quoted, delivered here, average less than 400 good."

This wire was sent at 4.19 p.m. During the greater part of the day he had been helping Grimbeek to load the wool on trucks.

Towards evening the stationmaster told him that the wool had been consigned to Wilman, Spilhaus & Co. Witness then asked Grimbeek how it was that he had consigned the wool to Wilman, Spilhaus & Co., after having sold it to Gottlieb. The defendant said that he could not wait until Sunday for his money and that the sale had better go through Wilman, Spilhaus & Co.

Defendant then sent the following telegram to Wilman, Spilhaus & Co.:

"Give Gottlieb first chance wool 4½d. all round delivered Fraserburg-road."

On the following morning at 8.15 he sent Gottlieb the following wire:

"Wool sent Wilman, Spilhaus. They have wire from Gottlieb. Give you first chance at 4½d. Settle for locks here."

At 10.45 a.m. on the same day he sent Gottlieb the following wire:

"Grimbeek gone. Claim wool from Wilman, Spilhaus as wired to-day. Cannot do more."

He had no interest whatever in the case.

Cross-examined: He was to get no commission from Gottlieb. He knew nothing about wool. He was at the station when the wool arrived. He told Grimbeek that Gottlieb wanted to know if the wool was for sale. Grimbeek said he knew Mr. Gottlieb, and would sell if he got his price. He said there were seventy-two bales. Witness wired to plaintiff; in fact defendant dictated the wire. Viviers was in the bar at the time, and might have heard what transpired. Grimbeek did not hand him a wire from Gottlieb and say he would not deal with Gottlieb at all. He helped Grimbeek to weigh the wool, and Viviers was there the whole time. Grimbeek dictated the two telegrams sent to Gottlieb. He did not make any attempt to stop the defendant sending the wool to Wilman, Spilhaus & Co., but it was nevertheless sold to the plaintiff. He did not take any further trouble.

Re-examined: This was his first attempt to sell or buy wool, and it would be the last.

Alfred Ernest Monday, formerly stationmaster at Fraserburg-road, said that Grimbeek and Stone both came to his office, and Stone wrote out a telegram to Gottlieb at Grimbeek's dictation. It was in connection with seventy-two bales of wool, and it described the price and the nature of the wool. Stone and Grimbeek was busy all that day weighing the wool, when subsequently Grimbeek instructed him (witness) to forward the wool to Wilman, Spilhaus & Co. He told Stone, who expressed astonishment.

Robert Kramer deposed that the wool was of excellent quality, and worth quite 5½d. at the time.

Frederick Gottlieb, the plaintiff, deposed that he was a trader at Fraserburg-road. He heard that Grimbeek had wool for sale, but he had to leave for Cape Town, and he instructed Stone to negotiate for him.

Mr. Hendrik P. J. Grimbeek, the defendant, deposed that he was a farmer and field-cornet, residing at Grootfontein in the district of Beaufort. On the 20th September he wrote to Wilman, Spilhaus & Co. asking for advice as to what he should do with his wool. On re-

ceiving a reply, he determined to sell his wool to Wilman, Spilhaus & Co., and on arriving at the Fraserburg-road Station, he at once proceeded to load the wool.

Continuing, the defendant gave the following version of what took place at Fraserburg-road Station: I arrived there with my wool at ten a.m. Some of my wool was already unloaded in the shed and some was still coming down by wagon. The first thing I did was to ask the stationmaster for trucks. He said he could let me have two trucks. I then proceeded to weigh my wool and load it on the trucks. John Viviers, my assistant, was present. I had about eleven or twelve bales on the trucks when Stone came to me. Viviers was present. Stone asked me whether I wanted to sell the wool. I replied, "For whom are you buying?" He said, "Gottlieb." I asked him what he wanted to give. He replied, "I will wire to Gottlieb." He told me Gottlieb was in Cape Town, but I knew that of my own knowledge. He came back and told me that he had wired to Gottlieb but I did not see the wire he sent. I then received a reply-paid telegram from Gottlieb asking me to specify the wool. Viviers was not present at the time of the receipt of this wire. I did not reply to the telegram although Stone wanted me very much to do so. I have not got the telegram because I handed it to Stone. My reason for not replying to the telegram was that I was nervous of transacting business with outsiders, and from what I had seen on a previous occasion of Gottlieb he had made an unfavourable impression on me. Stone was continually at me trying to persuade me to sell my wool to Gottlieb and offered me 4½d. all round if I would give the locks to boot. After he had pressed me a great deal I eventually said "If I sell to you how about my payment?" He said, "Never mind that, I shall stand security for Gottlieb." I said, "Look here, Stone, I do not wish to make any unpleasant remarks" (meaning that I did not consider his security sufficient), "but don't you think it would be better if you bought from Wilman, Spilhaus & Co.? I live a great distance from the station. The nearest bank is seventy miles from my farm and I have always dealt with Wilman, Spilhaus & Co., who have been my agents, and I know that my money is safe with them." He replied, "We have spent money on telegrams, won't you give Gottlieb a chance?" He got up, went to the telegraph office, brought out a form, and wrote out the telegram in my name dated 27th September, "Give Gottlieb first chance wool 4½d. all round delivered at Fraserburg-road." I did not sign it but I authorised him to send it off, which he did. He paid for the telegram

himself. He invited me to come and have tea with him: he also asked Mr. Viviers. I then went to the stationmaster, gave him the weights of the wool, and wrote out the forwarding note to Wilman, Spilhaus & Co. After having had tea with Stone we parted the best of friends and I returned to the farm. I deny that I sold the wool to Stone or Gottlieb. I would not sell to either of them because I did not trust them as far as payment was concerned, and my object in sending the telegram to Wilman, Spilhaus & Co. was to leave the matter in their hands to sell to Gottlieb if they could not get a higher price.

Cross-examined: If I could have got 4½d. all round I would have sold, because it was more convenient to sell at Fraserburg-road and I would have saved the carriage. I did not know anything about Gottlieb. Stone and I did not go to the stationmaster's office together. I must have told Stone about the twenty-two bales. Stone did help me to weigh the wool for a short time. He was not with me when the figures were given to the stationmaster. As I could not get my money on the spot the transaction fell through. The stationmaster wrote out the consignment notes and I signed them.

The witness Viviers corroborated the evidence of the last witness as to what took place when he was present.

Mr. Arnold Wilhelm Spilhaus, called by Mr. Graham, deposed that his firm (Wilman, Spilhaus & Co.) had acted for the defendant as agents for some years. They also acted for him in the selling the present parcel of wool. He received a telegram through Stone from Grimbeek to give Gottlieb the first chance at 4½d., but he was able to realise 5d. and, therefore, did not sell to Gottlieb.

Mr. David Stevens, of the Telegraph Department, produced the original telegrams sent between the parties.

Mr. Henry Bothes, a farmer, gave evidence to the effect that he had received money from Munday for wool sold to Gottlieb.

After argument,

The Court granted absolution from the instance, with costs.

The Chief Justice said: In this case the burden of proving the contract lies upon the plaintiff. He alleges that there was a contract of sale duly executed between him and the defendant. It is impossible to say that in many respects there is not some doubt in this case, but the Court must come to some decision, and as the onus lies upon the plaintiff, the Court expects from him clear proof that the contract was entered into. Now the first mistake made by the plaintiff was, when on the 27th

September he sent two telegrams ; one to Stone, and another to Grimbeek. Throughout these negotiations he never got any answer from Grimbeek. All the telegrams he received were from Stone. Well, if these telegrams before they were sent, were in every case shown to Grimbeek or were dictated by Grimbeek, it would be impossible to avoid the conclusion that a final contract was entered into between the parties ; but on this point it is quite possible that Stone may have been mistaken. Then another mistake the plaintiff made was in employing a man like Stone, a barman at the railway-station, to purchase wool ; a man utterly unaccustomed to business, who would really not know how to negotiate a matter of this kind. It is quite possible, however, that the first telegram was shown to Grimbeek by Stone, for notwithstanding Grimbeek's denial, I confess I cannot quite credit Grimbeek's statement that after 12.30 on the day in question he ceased to have any negotiations with Stone. Some or all of the information contained in the telegram sent after that hour from Stone to Gottlieb the defendant must have communicated to Stone ; but I am not convinced that the final telegram of acceptance was shown by Stone to Grimbeek. Stone himself was very busy as the barman at the station, besides seeing about the telegraphing, and it is quite possible that he may have omitted to show the final telegram of acceptance to Grimbeek ; nor am I quite satisfied that the final telegram regarding the loading of the wool was dictated by Grimbeek to Stone. Now the reason why I doubt it is this : if Stone himself had understood that there was a final contract between the plaintiff and Grimbeek on the basis of his (Stone's) telegram, that he had bought the wool at 4½d. and 3d., why did he then afterwards act as the scribe for the purpose of sending a telegram from Grimbeek to Wilman, Spilhaus & Co., to give Gottlieb the first chance at 4½d., all round, an entirely different contract to that which he says was already completed. Stone's telegram to Gottlieb, the plaintiff, stated certain terms, and he then, only a couple of hours afterwards, became the scribe for the purpose of sending a telegram from Grimbeek to Wilman, Spilhaus & Co., stating terms that were quite different. He could not have been satisfied that there was a final contract when he sent his original telegram to the plaintiff. Mr. Innes has said that because the telegram to Wilman, Spilhaus & Co. was to give the first chance to Gottlieb at 4½d., that firm was bound to deliver at 4½d., but that telegram clearly implied that if anybody else offered more than 4½d. Wilman, Spilhaus & Co. would be entitled to sell to

Gottlieb. There was also another discrepancy between the two telegrams ; and, in fact, the telegram to Wilman, Spilhaus & Co. disclosed an entirely different contract to that which was stated in the telegram sent two hours before to Gottlieb. Well, under these circumstances, the plaintiff is himself to blame. If he employs a man like Stone to do his work for him, and it is done in so unbusiness like a manner, he is himself to blame. The onus of proof, as I have said, lies upon the plaintiff, and as in my opinion he has not satisfied that onus, absolution from the instance must be granted with costs. But the cost of the witness Bothes, who was brought from the country by the defendant, and gave no evidence that was relevant to the case, will not be allowed.

Mr. Graham applied for the defendant's expenses as a witness.

The Court granted the application.

[Plaintiff's Attorneys, Messrs. Tredgold, McIntyre & Bisset ; Defendant's Attorney, C. C. Silberbauer.]

SUPREME COURT

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Sir THOS. UPINGTON, K.C.M.G.]

PROVISIONAL ROLL.

HEUGH'S TRUSTEES V. FRY'S { 1895.
EXECUTRIX. { Nov. 30th

Mr. Close applied for provisional sentence upon a mortgage bond for £800, the property specially hypothecable to be declared executable.

Granted, subject to the production of certificate of defendant's appointment.

VAN DER BYL V. UREN.

Mr. Close applied for provisional sentence on a promissory note for £50 and for judgment for £44 13s. 1d.

Granted.

ATKINSON'S EXECUTORS V. JELlicOSE.

Mr. Jones moved for provisional sentence on a mortgage bond of £1,200, with interest, the property to be declared executable.

Granted.

PURCELL V. VAN RENSBURG.

Mr. Jones moved for provisional sentence on a mortgage bond for £600, the property specially hypothecable to be declared executable.

Granted.

FITTIG V. PEDERSEN.

Mr. Graham applied for provisional sentence on four promissory notes for £10 each, less £20 paid on account.

Granted.

ILLIQUID ROLL.**FAIRBRIDGE V. VAN DER SPUY.**

Mr. Tredgold applied for judgment for £200, for professional services.

Granted.

NEEZER V. PENTECOST.

Mr. Stoney applied for judgment for £83 2s., balance due for rent.

Granted.

MOORE V. SPANGENBERG.

Mr. Maskew applied for judgment for £8 19s. 11d., the amount of costs in the suit, the principal having been paid.

Granted.

**CROSS V. CROSS'S EXECUTORS. { 1895.
Nov. 30th.**

Will—Non-execution in terms of the Ordinance—Invalidity.

This was an action instituted by the children of the late Joseph and Margaret Cross (his predeceased spouse) against James Will, Edward Charles Cross and Andrew Barclay Shand as co-executors testamentary of the estate of the late Joseph Cross, and Dan Victor Kannemeyer in his capacity as executor dative of the estate of the late Margaret Cross, to have a document which purported to be the last will and testament of Margaret Cross declared null and void.

The declaration alleged that on the 28th May, 1886, Joseph Cross and his wife Margaret, who were married in community of property, signed a document purporting to be their last mutual will, in terms of which the first dying appointed the survivor to be the sole and universal heir of all his or her estate and effects of whatsoever kind, and also executor under his or her said will.

Margaret Cross died in July, 1886, without

having executed any other testamentary document and her husband, Joseph Cross, who had been nominated as executor under the said will, did not take out letters of administration under the said will, but enjoyed and remained in possession of the whole of her share of the joint estate as sole and universal heir until the day of his death.

Joseph Cross died on 5th July, 1895, leaving a will by which the first three defendants were appointed his executors testamentary, and they have duly taken out letters of administration. The document signed by Margaret Cross on the 28th May, 1886, was not validly executed by her as a will in accordance with the law, inasmuch as her signature thereto was not made or acknowledged in the presence of two or more witnesses present at the same time, nor did such witnesses attest the said will in her presence.

By reason of the premises and in virtue of the provisions of section 3 of Ordinance 15 of 1845, the plaintiffs submit that the will of their mother, the late Margaret Cross, was invalid and of no legal force or effect.

The plaintiffs, the second-named defendant, and Reuben Cross, whose present residence is to the plaintiffs unknown, are the only children of the marriage of Joseph and Margaret Cross, and they, together with the defendants as representing the estate of Joseph Cross and the estate of Margaret Cross, are the only persons interested in the question of the validity or otherwise of the document signed on the 28th May, 1886, by Margaret Cross.

The first three defendants wrongfully maintain that the said document was validly executed as a will, and they are entitled to deal with and distribute all the assets found in the estate of the late Joseph Cross at his death, including assets which formed part of the estate of the late Mrs. Cross.

The plaintiffs claimed :

(a) An order declaring that the document purporting to be the will of the said Margaret Cross, dated 28th May, 1886, is of no legal effect, and is null and void.

(b) An order declaring that the defendants, the executors of Joseph Cross, are bound to pay to the estate of the late Margaret Cross an amount equal to the present value of her share of the joint estate of herself and her husband as the estate existed at the date of her death.

(c) Alternative relief and costs against the first three defendants.

The first three defendants in their plea put the plaintiffs to proof of the allegations made in the declaration.

They said that they were entitled to deal with the assets found in the estate at the death of

Cross, unless proof be made to the satisfaction of the Court that the will of Margaret Cross was not validly executed.

They submitted to the judgment of the Court, and prayed that they might be held harmless in costs.

The fourth-named defendant submitted to the judgment of the Court.

Mr. Rose-Innes, Q.C., appeared for the plaintiffs.

Mr. Searle, Q.C., for the first three defendants, and Mr. Stoney for the fourth defendant.

Clifford Meyer van Coller, a clerk in the Master's Office, proved the filing of the joint will of Joseph Cross and Margaret Cross on August 9, 1886, and the will of Joseph Cross on July 29, 1895. (Copies of both wills were handed in.)

The Rev. Mr. Davidson deposed that he was a Presbyterian minister residing at Adelaide. He was one of the witnesses to the will. Some time in May, 1886, Mr. Cross brought him the will, and asked him to keep it until all were prepared to sign it. He kept the will about a week, at the expiration of which time he received a message from Mr. Cross to bring the will. He brought it and took it in to Mrs. Cross, who was then lying dangerously ill. Mrs. Cross signed the will, he and she being the only persons present at the time. He then left the bedroom and met Mr. Cross, Miss Cross, and Dr. Conroy in the passage. Mr. Cross, Dr. Conroy, and witness then went into a room on the opposite side of the passage to Mrs. Cross's bedroom and signed the will.

From her bedroom Mrs. Cross could not see them in the opposite room. He first mentioned the circumstance attending the execution of the will to John Joseph Cross after his father's death.

Cross-examined: Even if the two doors had been open Mrs. Cross could not have seen them in the opposite room.

By the Court: Was not aware if the children knew that we were signing the will. Could not remember if he had read the will to Mrs. Cross, but she appeared familiar with its contents. After the will had been witnessed Mrs. Cross did not acknowledge her signature in the presence of the witnesses.

Dr. Conroy, the second witness to the will, corroborated the evidence of the last witness.

Mr. John Joseph Cross, the testator's eldest son, deposed that he was at present farming in the district of Albert. At the time of his mother's death he farmed in the Fort Beaufort district. He never prior to his father's death saw the mutual will, but he knew that one had

been executed under which he understood that his father was to have a life interest in the joint estate, and at his death the property was to go to the children. It was only after his father's death that he ascertained the circumstances under which his mother's will had been executed. He then sought legal advice and the present proceedings were instituted. His father re-married eight months after his mother's death, and by his will some of the property was given to his second wife some to one son, and some was entailed.

By the Court: His father gave him (witness) a legacy of £873, rent due to his father since his mother's death. His father was indebted to him (witness) in the sum of £260.

Mr. Charles Emanuel Cross deposed that he was seventeen years old when his mother died. He never saw the will, but heard that one had been executed in terms of which the property was to go to the children after his father's death. He first heard the contents of the will from his brother, the last witness. He knew that his father had filed no account, nor did he take out letters of administration.

This closed the evidence.

The Court declared the will of the 28th May 1886, invalid.

The Chief Justice said: It is quite clear that in the execution of the document now before the Court the provisions of the Wills Ordinance were not complied with. The testatrix did not sign this document, nor acknowledge her signature in the presence of the witnesses at the time of execution, nor did the two witnesses subscribe the will in the presence of the testatrix; and if the plaintiffs had brought the action immediately after their mother's death, no difficulty could possibly have arisen in this case. But I confess I felt some difficulty in the case, because I saw the danger that might arise from allowing parties to challenge the validity of a will many years after the death of the alleged testator or testatrix, more especially in a case like the present, where the surviving testator was left under the impression that the joint will made by himself and his wife would be afterwards recognised by those taking benefits under his own will. It may well be that there are provisions in the testator's second will which he would not have inserted if he had believed that after his death the joint will made by himself and his wife would be challenged by anyone. But I am perfectly satisfied from the evidence given in this case that the conduct of the children has been perfectly *bonâ fide*, and I am satisfied that they were not aware of the true contents of the will, and that they believed that the will had been properly executed until after the death of their

father, and under these circumstances the difficulty which I first felt will no longer weigh upon me. It is clear also in this case that the penalty which the law provides against the surviving spouse, who remains in possession of the joint estate without filing an account, cannot be enforced as against the estate of the late Joseph Cross, because he appears to have acted perfectly *bona fide*; he believed that under the will he was entitled to the whole of the estate of his wife, and, therefore, in that belief he was quite justified in remaining in possession of the joint estate. But he certainly ought to have framed an inventory and filed an account, and under ordinary circumstances the penalty against the survivor for not framing an inventory and for not filing a proper account would be that any profits derived by him from the continued possession of the joint estate would have to be accounted for to the heirs of his wife. But Mr. Innes candidly admits that the penalty ought not to be enforced under the peculiar circumstances of this case. The Court will, therefore, declare the will to be invalid, and declare that the executors of Joseph Cross are bound to pay to the estate of the late Margaret Cross her share of the joint estate of herself and her husband as the said estate existed at the time of her death. Of course, it is understood that any assets which still exist *in specie* are to be divided equally, and that the plaintiffs are to have the benefit of any increase in the value of such assets, but as to assets which are not *in specie*, they are simply to be valued at the valuation which they had at the time of Mrs. Cross's death. As to the costs of this action, I think they should be borne by the joint estate.

Mr. Justice Buchanan concurred.

Mr. Innes asked that the expenses of the plaintiffs be allowed.

The Court granted the application.

[Plaintiffs' Attorneys, Messrs. Fairbridge, Arderne & Lawton; Defendants' Attorneys, Messrs. Scanlen & Syfret.]

DU PREEZ V. NEETHLING. } 1895.
Nov. 30th.

Sale and purchase—Breach—Damages.

This was an action for the delivery of two horses or their value, £40, and for £25 damages.

The declaration alleged that on the 20th May, 1895, the defendant sold to the plaintiff a pair of horses for £40.

That the defendant accepted in settlement of the purchase price a promissory note for £40 drawn in his favour by one C. H. Hoffman.

The defendant has refused, and still refused, to deliver the horses in consequence whereof plaintiff has incurred expense in the hire of other horses, and has suffered damage in all amounting to £25.

The plaintiff claimed:

(a) A decree ordering defendant to deliver to plaintiff the said horses, or in default thereof their value, £40.

(b) Judgment for the sum of £25 and costs.

The defendant pleaded that on the 20th May, 1895, the defendant agreed to sell two horses on credit, upon the condition that one Hoffman should become surety for the amount of the purchase price, and it was agreed that a promissory note, signed by plaintiff and Hoffman, should be drawn up. Thereupon the plaintiff wrote out a document, and the said Hoffman signed it. The plaintiff then falsely and fraudulently, and with intent to deceive and defraud the defendant, purported to read out the said note as binding himself as buyer, and Hoffman as surety, and then handed it to the defendant in a closed envelope without exhibiting it to him, and without letting him see the contents. Thereafter the defendant discovered that the said note was signed by the said Hoffman alone, and not by the plaintiff, and immediately gave the plaintiff notice thereof, and refused to deliver the said horses to him. The defendant refused to accept the said promissory note in settlement of the said purchase price, and the plaintiff has not paid the said price or any part thereof, nor has the defendant received any part of the said price.

Replication general.

Mr. Searle, Q.C., and Mr. Close appeared for the plaintiff.

Mr. Juta, Q.C., and Mr. Smuts for the defendant.

Henry Robert du Preez, the plaintiff, said he was an auctioneer and appraiser, practising at Bredasdorp. On May 28 last he met defendant for the first time at Bredasdorp. Defendant visited witness's office with a cart and horses. Mr. Hoffman lived next door, and was a cart-builder. Witness asked defendant if he would sell his horses, and he said "Yes, for £40." Hoffman was present at the time. Witness then tried the horses, and got into the cart, and upon his return he told defendant he would buy the horses for £40 if he would allow witness two months for payment. Defendant agreed to the proposal without hesitation. Mr. Henry Marais and Mr. Kyk Myburgh were present. Mr. Hoffman and the Rev. Mr. Duminy then tried the horses, and while they were doing so, witness concluded his bargain with defendant in the terms of his proposal. The Rev. Mr.

Duminy told witness that if he had not bought them he would have done so, and offered to buy the horses from witness. Witness said he had to go to Heidelberg shortly, and required the horses. When Mr. Duminy left, defendant, Marais, Hoffman, and witness went into witness's office, Myburgh following shortly afterwards. Witness then told defendant that as Hoffman was well known to him he might take his promissory note instead of his (witness's), as witness was unknown to defendant. Defendant agreed, and witness wrote out the promissory note, Hoffman signing it in the presence of defendant and Marais. The terms of the note were half of the money at the end of a month and the remainder in two months. Before the note was signed witness read the note to defendant, who offered no objection. The note was not sealed in an envelope, but was handed openly to defendant. Witness then told defendant that he (witness) would settle with Hoffman, and defendant must settle with Hoffman. Defendant agreed to fetch the money from Hoffman when it became due. Hoffman, who was witness's landlord, owed witness about £2 or £3. Witness allowed the defendant to take the horses away on the understanding that witness took possession of them in a day or two. However, when he wrote to defendant asking for the horses, defendant replied to the effect that as the promissory note did not make any statement as to the horse having been bought by witness, he (defendant) had better keep them. Defendant did not deliver the horses, and had not visited witness since. In consequence witness had to hire horses to go to Heidelberg. On the 20th of June, when the first instalment became due, witness offered the money to Hoffman. The horses were then worth £50. Indeed, he had practically been offered £45 for them. Defendant had since sold the horses to Mr. Duminy.

By the Court: He had been in business for some time. He asked Hoffman to sign the promissory note because he (witness) had not the money at the time, and was not well known to defendant and his family, whereas Hoffman was well known to him. Witness thought that the arrangement was satisfactory.

Christoffel Hoffman, cartbuilder, Bredasdorp, corroborated the previous witness's evidence as to the transaction with the defendant.

Henry Marais, living at Bredasdorp, said he was clerk to the plaintiff in May last, although he did not fill that post at present. Witness also gave evidence of a corroborative nature, as did Ryk Hendrik Myburgh, a farmer at Dor-drecht.

Andries Louwrens, who in May last was a

general labourer at Bredasdorp, said that the plaintiff sent him to defendant for the horses, but defendant declined to send the horses to plaintiff, saying that Du Preez had bought the horses, and that on the following Monday defendant would bring them to Du Preez. Defendant gave witness a letter, which witness handed to Hoffman. The horses in question were good ones, and were worth £50.

Cross-examined: Defendant told him that Hoffman's name was first on the promissory note, but he did not say that plaintiff's name was not there at all. Defendant fixed Monday as the day for returning the horses, as on that day he intended paying a visit to some friends in the village.

This closed the case for the plaintiff.

Johannes Petrus Neethling, the defendant, said he was twenty-two years of age. Speaking as to the alleged transaction, he said that he said plaintiff could have the horses on condition that Hoffman stood security for the purchase price. Eventually the promissory note was drawn up on these terms, Du Preez wrote the promissory note to that effect, and read it out as stating that he was the maker and Hoffman was the security. Hoffman then signed his name to the note, and afterwards plaintiff handed the note to witness sealed in an envelope. Witness did not read the note until afterwards. He would not have accepted the note if he knew that it had been signed by Hoffman alone, as he thought two signatures were better than one. Next morning plaintiff's boy came to witness's house to fetch the horses, but witness declined to send them as he had discovered that the promissory note had not been made out according to the agreement. Witness sold the horses to Mr. Duminy about the end of June for £40. Witness considered that plaintiff had fraudulently deceived him.

By the Court: He did not keep the envelope in which the promissory note was sealed by plaintiff. There was no writing upon it.

Examination continued: Hoffman had never offered him £20 in connection with the transaction.

Cross-examined: Plaintiff did not hand the promissory note to witness loose.

By the Court: He did not return the note, because it was of no value.

Cross-examination continued: Mr. Duminy had paid him £45 for the horses. He had been anxious to buy them all the time. He had never written to plaintiff accusing him of fraud.

Re-examined: He obtained the money for the horses from Mr. Duminy at about the same time that the promissory note would have fallen due,

Mr. Jutz having addressed the Court,

Plaintiff (recalled) said that when he stated that he would have to go to Heidelberg on Wednesday, and that he had bought the horses for the purpose, defendant was present. Witness paid £4 for the hire of the cart.

Cross-examined: He made that statement before and after the sale. He said he wanted the horses at once.

The Chief Justice said: Very great expense must have been incurred in order to try this very petty suit, but at the same time the plaintiff had no other option but to proceed with this action, especially after the allegation was made that he had defrauded the defendant in the manner stated in the plea. In my opinion this plea of fraud is wholly unfounded; there is, in my opinion, not an atom of justification for the plea, and I am thoroughly satisfied from the evidence of the witnesses for the plaintiff, that the document, the promissory note, was not handed to the defendant in a sealed envelope, but that it was handed open to the defendant, and that he had an opportunity of reading this document before he drove away from Bredasdorp on the 20th of May last. The transaction is undoubtedly, in some respects, a peculiar one. It does strike one as strange that a business man like the plaintiff should have allowed Hoffman to sign a promissory note in respect of a purchase made by the plaintiff himself, but the explanation given by the plaintiff is that he thought that, as he was not well known to the defendant and his people, it would be more satisfactory for the defendant that Hoffman's name should be on this promissory note. The more business-like manner would have been—if it was intended that the signature of both should be upon the note—that the plaintiff should have made the promissory note in favour of Hoffman, or the reverse, and that it should have been endorsed by Hoffman, or by the plaintiff. That, no doubt, would have been the more business-like way of doing it. But as the defendant, to all appearances, was prepared to accept this document, he had no right afterwards, when he thought that he had not made a good bargain, to turn round and say, "I refuse to abide by it." His letter, written on the 21st of May, is a peculiar one. He knew that the boy was to be sent for the horses on the very same day, and yet he writes to the plaintiff on the following day, "The promissory note says nothing about your having bought the horses from me, and I therefore think it better for me to keep my horses." If it be true that he knew at this time that this fraud had been perpetrated upon him,

and that this document had been handed over to him in a sealed envelope, one would have supposed that he would have at once written to this effect, "I find now that the document which you gave me in a sealed envelope is a promissory note signed by Hoffman, and not by yourself, and I therefore return the document herewith. Be good enough to send to me a proper document signed by yourself and endorsed by Hoffman, and after that has been done I will send the horses." That is what an honest man would have done. In my opinion this letter of the defendant was simply an attempt to get out of the bargain, and I am not surprised, therefore, that the plaintiff afterwards refused to make any further inquiries. He may have put this construction on the defendant's letter, that the defendant was dishonestly trying to get out of the bargain, and asked for no explanation, but demanded the horses. The plaintiff, therefore, is fully entitled, in my opinion, to judgment that the horses be delivered to him, or failing that their full value. If more than £40 had been asked as the value of the horses, I should have been prepared to give it, but Mr. Searle is contented now with an order to this effect, that the defendant be ordered to deliver the horses to the plaintiff, upon payment to the defendant of the sum of £40. But a further order must be made, that failing the delivery of the horses—because it is possible that the defendant may not be able to get back the horses from Duminy—there must be an order as to damages. Well, the true measure of damages would be what it would have cost the plaintiff to have bought a similar pair of horses. The evidence upon that is certainly not very strong, but still there is evidence in favour of the plaintiff to this extent that such a pair of horses could not have been bought for less than £45, and therefore the damages clearly sustained would be the sum of £5. Judgment will therefore be as I have said that defendant be ordered to deliver to the plaintiff the pair of horses on payment of £40, and failing such delivery that the defendant be ordered to pay the sum of £5 to the plaintiff. The defendant certainly must pay all the costs of this case.

Their lordships concurred.

Mr. Searle applied for the plaintiff's expenses as a necessary witness.

The Court granted the application.

Mr. Searle: Does the Court direct that delivery be made forthwith, or within a certain time?

The Chief Justice: As soon as you tender the money, the defendant must give up the horses. Give him notice. Of course, if he does not then

deliver the horses, payment of £5 must be demanded.

Mr. Searle: I presume that the promissory note will be given up?

The Chief Justice: Oh, yes; unless they choose to have the promissory note instead of your £40.

Mr. Searle: After we have paid the £40, the promissory note is to be given up?

The Chief Justice: Yes.

Plaintiff's Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorney, G. Montgomery-Walker.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

REHABILITATIONS.

Ex parte JOHN MASTERSON AND } 1895.
DAVID FRASER MASTERSON. } Dec. 2nd.

Mr. Buchanan moved for rehabilitation.
Granted.

Ex parte PHILIP RUDOLPH BOTHA.
Mr. Close moved for rehabilitation.
Granted.

Ex parte EDWIN DODD.
Mr. Watermeyer moved for rehabilitation.
Granted.

THE GRAND HOTEL COMPANY.
Mr. Jones applied for an order in terms of the report of the liquidator of the said company.
The application was granted.

Ex parte GUEST. } 1895.
Re PAWLE'S WILL. } Dec. 2nd.
Executor testamentary—Resignation—Appointment of trustee.

The Court in relieving an executor testamentary of his trust, owing to his advancing years and infirmity, appointed a trustee in his place to assist in administering the estate.

This was the petition of William Charles Guest, who together with William Walter, were

appointed executors testamentary of the estate of the late Dr. James Pawle, of George.

The petition alleged *inter alia* that owing to Mr. Walter's advancing years, he being eighty-six years old and an invalid confined to his room, it was desirable to relieve him of his trust and to appoint another person in his place.

That Mr. Alfred George Robertson was a fit and proper person to be appointed and that he had expressed his willingness to accept the trust.

Dr. Pawle's will provided that upon the resignation of either of the executors the testator's children could appoint another executor. They named Mr. Robertson subject to the Court's approval.

Annexed to the petition was a letter from Mr. Walter expressing his desire to be relieved of his trust for the reasons above stated.

Mr. Watermeyer moved and asked for an order similar to that made in *Ex p. re Michell* (5 Sheil, 157).

The Court granted the order.

The Chief Justice said: Under the special circumstances of this case the Court will relieve Mr. Walter of his trust and appoint Mr. A. G. Robertson as trustee to administer the estate together with Mr. Guest. The will provides that upon either of the executors resigning the testator's children should select another person in his place. The present executors have certain administrative duties to perform, and in performing these duties they may be regarded as trustees, and indeed it is in this capacity that they are acting at present. The Court cannot itself appoint an executor, but it can appoint a trustee, and as the children have nominated Mr. Robertson we will confirm his appointment.

[Applicant's Attorneys, Messrs. Scanlan & Syfret.]

IN THE MATTER OF THE LUNATIC MARTHA M. VAN DER WALT.

Mr. Tredgold moved for authority to the curator to dispose of the farm Modderfontein in the district of Albert, the property of the lunatic, as well as certain movable assets, in order to pay her debts, the curator, who is her son-in-law, undertaking to provide for her future maintenance and support.

The Court granted the order; the balance, after payment of debts, to be invested with the approval of the Master.

IN THE ESTATE OF THE LATE CORNELIS D. MOSTERT AND HIS SURVIVING WIDOW.

Mr. Molteno moved for authority to the curators of the two children to accept a mort-

gage bond over such property of the said estate to secure their inheritances as may be found desirable. the said children, who are majors, having been declared incapable of managing their affairs by reason of physical and mental infirmity.

The application was granted.

THE PETITION OF JAMES WYLLIE.

Mr. Close moved for authority to the Registrar of Deeds to pass transfer to petitioner of certain piece of land near Salt River, Cape Division, at present registered in the names of Wells and Turner, who have left the Colony, and whose places of residence are unknown, by virtue of a power executed by them in 1883 in favour of Koller & Steer, both of whom died before the property could be sold, or for the sequestration of the estates of the said Wells and Turner, or attachment of the land in question *ad fundandam jurisdictionem* of this Court.

The Court granted an order attaching the property *ad fundandam jurisdictionem*, and authorising the plaintiff to sue by edictal citation, returnable on the 1st February. Personal service to be effected, failing which one publication in the "Gazette." Prayer to be made that the particular property be declared executable.

THE PETITION OF FORMER SYPKENS.

Mr. Smuts moved for the attachment of certain four lots of ground situated in the village of Venterstad, *ad fundandam jurisdictionem* of this Court, in an action about to be instituted by petitioner, by edictal citation, against one Marthinus J. L. Prinsloo, for the recovery of an amount due on a mortgage bond.

The Court granted an order for the attachment of the property *ad fundandam jurisdictionem*; with leave to sue by edictal citation, returnable on the 12th January. Personal service to be effected.

IN THE ESTATE OF THE LATE EDWIN J. BOWERN.

Mr. Molteno moved for an order making absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act, for the transfer to the said estate of certain piece of ground marked No. 6, situated at Mowbray, Cape Division. purchased about thirty years ago by the said Bower from Edward Stevens. whose whereabouts are unknown, and in whose name the land is still registered.

The order was granted.

RANDALL V. GRAY. } 1895.
Re "THE BLAIRHOYLE." } Dec. 2nd.

Appeal to the Privy Council—Security to abide judgment.

In an action to recover £5,000 for salvage services, the owners of the salved ship tendered £1,000, for which amount judgment was given in favour of the plaintiffs.

The defendants paid the £1,000 less their taxed costs incurred subsequent to the date of tender in terms of the judgment.

Subsequently the plaintiffs obtained leave to appeal to the Privy Council, and thereafter they applied to the Court to compel the defendants, who resided out of the jurisdiction, to give security to abide the judgment of the Privy Council.

The Court refused the application on the grounds (1) that the presumption was that the amount of the judgment was sufficient, and (2) that even if the amount were increased by the Privy Council the judgment could be enforced in Great Britain.

This was an application on notice by the captain of the screw steamship Congella, calling upon the defendant, the captain of the British barque Blairhoyle, now lying at Algoa Bay, to show cause why he should not be ordered to give security to abide any judgment which may be given by Her Majesty in her Privy Council in the appeal from the judgment of the Supreme Court delivered on the 5th November last.

On the 14th November last, leave to appeal was granted, upon the appellant entering into the requisite security in terms of the 50th section of the Charter of Justice, but no order was made as to suspending the judgment.

Since leave to appeal was granted, application had been made to the respondent's attorneys for security to abide any judgment which might be given by the Privy Council, but they refused to do this.

It was now alleged, on behalf of the applicant, that the respondent was resident beyond the jurisdiction of the Supreme Court, and that unless the security demanded were given, the appellant would, in case the Privy Council should alter the judgment of the Supreme Court, have great difficulty in recovering any amount which might be due to him.

The amount awarded by the Supreme Court (£1,000, the amount of the tender) had been paid, less the taxed costs of defendant incurred

subsequent to the date of tender, and the ship had been released from attachment.

Mr. Rose-Innes, Q.C., was heard in support of the application.

Mr. Sheil (with him Mr. Close) for the respondent.

The Court refused the application with costs.

The Chief Justice said: It is quite impossible for the Court now to assist the applicant, because the judgment of the Court having been given for £1,000 the presumption at all events is that no more is due. Of course it is possible that the Privy Council may award more, but this Court cannot assume that it will. I do not think the applicant will be without his remedy if the Privy Council should increase the amount; I feel confident there will be a means in England or Scotland of making the judgment available as against the owners and against the ship. The application must be refused with costs.

Applicant's Attorneys, Messrs. Van Zyl & Buissinné; Respondent's Attorneys, Messrs. Scanlen & Syfret.]

ATMORE V. CHADDOCK. { 1895.
Dec. 2nd.

Commission de bene esse—Evidence.

The Court appointed a commission to take the evidence of the defendant and her witnesses, who resided in England, in an action pending in the Supreme Court, where it was not absolutely necessary that such witnesses should be present at the trial.

This was an application on notice by the defendants in the action, the *curator ad litem* of the minor and Rebecca Chaddock in her capacity as executrix testamentary jointly with the plaintiff, John Joseph Atmore, of the estate of the late Edward Atmore, for the appointment of a commission to take her evidence in England.

The defendant was summoned personally to pass transfer to the plaintiff of certain land or for an order authorising the passing of such transfer without the production of the defendant's power of attorney, and in his capacity as executor of the late Edward Atmore the plaintiff claimed an order compelling the defendant forthwith to produce as an asset of the estate of the late Edward Atmore, and join with the plaintiff in investing in terms of the will the sum of £880 for the benefit of the minor child of the late Edward Atmore and herself or that she forthwith pay over to the Master the said sum of £880 to be held by him for her benefit as usufructuary and thereafter for her minor child.

The defendant pleaded to the declaration submitting to the judgment of the Court.

On the 14th February last the Court appointed Mr. Tredgold *curator ad litem* to represent the minor with power to intervene as co-defendant.

The *curator ad litem* pleaded to the declaration that the landed property forms part of the estate of the late Edward Atmore, claiming in reconvention that the landed property be transferred to the minor and also that the plaintiff and defendant (defendants in reconvention) be ordered to invest the money and securities for money which Atmore died possessed of, together with the proceeds of a policy of life assurance, namely, the sum of £308 2s. 6d. and the sum of £942 11s. 6d., for the benefit of the minor, and also claiming that a proper account should be filed in the estate of the late Edward Atmore.

The petition alleged that prior to his death Edward Atmore and the plaintiff carried on business in partnership as millers, and that subsequently the plaintiff and the defendant carried on the same business,

That two liquidation accounts were filed by the plaintiff and the defendant as executors in Atmore's estate. That the defendant left everything to the plaintiff and signed the accounts on the assurance that they were correct.

That in the first account Edward Atmore's estate was debted with £480 as money owing to the plaintiff and that the defendant accepted his assurance in respect thereof, but that she had since ascertained that the plaintiff had produced no proof at any time that such an amount was owing to him.

That the intervening defendant claims to have a new account filed in the estate.

That it is also in dispute whether Edward Atmore was domiciled in England or in the Cape, and that the intervening defendant was advised that this question was of great importance to her case.

That it was necessary in order to determine the question in dispute that a commission should issue to take the evidence of the defendant, who resides in London, and of one William Allen, who resides at Wymondham in the county of Norfolk, and such other members of the family as can give evidence.

The respondent, the plaintiff in the action, denied that his brother, the late Edward Atmore, was at the time of his death domiciled in England, of which, he alleged, that there was ample proof in the Colony.

He said that the defendant was fully acquainted with the business affairs of her late husband and in the settlement of all matters

connected with his estate, and that between her and himself (plaintiff) she acted under the advice of her attorneys in Cape Town.

He denied that his brother and himself carried on business as millers, he alleged that they entered into partnership for that purpose, but that he died shortly thereafter, and that it was not until twelve months after his death that he (plaintiff) commenced such business.

He finally said that for the purpose of the case it was desirable that the defendant should give her evidence before the Court.

Mr. Tredgold moved.

Mr. Juta, Q.C., and Mr. Searle, Q.C., for the respondent.

Mr. Innes, Q.C., for Mrs. Chaddock.

The application was granted.

The Chief Justice said: If Mrs. Chaddock had been the plaintiff in this case and brought the other side into court, the Court would have hesitated to order or to grant permission that her evidence should be taken on commission; but she is the defendant, and as she is resident in England I think, under all the circumstances of the case, the Court ought to allow her evidence to be taken on commission. The plaintiff will have ample opportunity for preparing materials for cross-examination, and counsel will no doubt cross-examine properly if proper instructions are given. It is a long way to come from England, and a very great expense, and I do not think her evidence is so vital that it is absolutely necessary she should be here. The Court will grant an order for the examination of Mrs. Chaddock, costs to be costs in the cause.

Mr. Juta asked that it should be a joint commission.

The Chief Justice assented, and appointed Mr. Mackarness commissioner.

[Plaintiff's Attorney, W. E. Moore; Defendants' Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

DAY V. DAY.

Mr. Day, the plaintiff, applied in person for an order extending the return day of the rule nisi granted in the suit instituted against his wife for restitution of conjugal rights, and for directions as to service of the rule, the whereabouts of the defendant being unknown.

The applicant asked that service at Mrs. Whittle's, 17, Men Hall-street, Bolton, be authorised. He had received a letter from his wife which he handed in to the Court.

The application was granted.

The Chief Justice said: It is clear from the defendant's letter that she is well aware of the

proceedings; a newspaper report of them has been sent to her; so that the same strictness will not be required as to service. The Court will extend the return day to the 15th February. The order to be served by registered letter to the defendant, to the care of Mrs. Whittle, 17, Men Hall-street, Bolton, England. It must be made clear, when the rule is to be made absolute, that money has been tendered in some form or another to the defendant to enable her to come to the Colony, because the only proof now is that the plaintiff wrote to her father saying, "Please hand her money." There must be clear proof that the father has handed her the money, or that the money has been tendered to her.

HAUMAN V. MOFARLANE AND RESIDENT MAGISTRATE OF CALEDON. { 1895.
Dec. 2nd.

Mandamus—Resident Magistrate—Refusal to admit further evidence—Formal tender.

The Court refused to grant a mandamus compelling a Resident Magistrate to re-open a case tried before him and to admit further evidence where such evidence had not been formally tendered at the trial.

This was an application on notice to the respondents calling upon the first named to show cause why an order in the nature of a *mandamus* should not be granted requiring him to re-open the hearing of a certain suit in which the applicant was plaintiff and the first-named respondent was defendant, and which suit was in part heard on 31st October, 1895, and in which, as the notice alleged, the Resident Magistrate of Caledon wrongfully and unlawfully delivered judgment against the plaintiff before his case was closed and notwithstanding objection taken by him to such procedure, which objection moreover the Resident Magistrate wrongfully and unlawfully declined to minute on the record of the case, and further requiring the Resident Magistrate to allow the plaintiff to adduce the further evidence which on the aforesaid day he was prepared to adduce, and would have produced but for the Resident Magistrate's declinature, and also why he (the Resident Magistrate) should not be adjudged to pay the costs attending the present application, or why such further or other order should not be made in the premises as to the Court should seem meet.

The first-named respondent was notified that costs would also be claimed against him should he appear to oppose the granting of the relief sought by the applicant,

The action in the Magistrate's Court was for £5 1s. 6d., being the price of twenty-six bags of chaff alleged to have been delivered to the defendant during the month of February, 1895.

The defendant, in his plea, denied having at any time purchased the chaff as alleged in the summons, and consequently denied the debt and prayed for a dismissal of the case with costs.

The defendant then specially pleaded as follows: If the Court holds that defendant is in any way liable, but not otherwise, the defendant says that the plaintiff is entitled to the sum of £4 2s. 8d. only, being for thirty-nine bags of chaff purchased, as defendant believes, by his brother-in-law, Valentine J. Beyers, from the plaintiff at 3s. 6d. a bag, being the price as averred by the plaintiff, but as to which price defendant is ignorant. £5 1s. 6d., less the sum of 18s. 10d. for eight new bags not delivered by plaintiff and for expenses and damages incurred through such non-delivery of the bags by the plaintiff, and this amount of £4 2s. 8d. was tendered and paid to plaintiff's attorney on the 4th October, 1895, as and on behalf of the said Valentine J. Beyers.

The defendant finally pleaded the general issue.

To this plea the plaintiff replied denying the allegations in the first count and joining issue with the defendant.

As regards the second count of the plea the plaintiff said that the defendant was justly and truly indebted to the plaintiff in the sum of £5 1s. 6d., for twenty-nine bags of chaff, and not thirty-nine bags as stated in the said count. Further, the plaintiff denied that the defendant had sustained any damage in and about the purchase by him of the said chaff, and further denied the legality and sufficiency of the said tender and that the same was made on behalf of one Valentine J. Beyers, but said that the same was made by and on behalf of the defendant, and he therefore joined issue with the defendant and again prayed for judgment with costs.

After the plaintiff had given his evidence, in which he admitted that he had sold the chaff to Beyers and not to McFarlane, the defendant's attorney applied for absolution from the instance as on the plaintiff's own evidence the sale had been to Beyers.

The Magistrate adopted this view and granted absolution from the instance with costs.

The plaintiff's attorney Mr. C. J. Krige, after referring in his affidavit to the fact that the defendant and Beyers carry on business in partnership (an allegation denied by the defendant and Beyers) went on to say: "Immediately upon the conclusion of the plaintiff's

evidence . . . and before I had closed my case, the defendant's attorney rose and asked for absolution on the ground that plaintiff had failed by his own evidence to prove the defendant liable. The Magistrate then called upon me and asked me what I had to say to the application. I replied that if my friend would only give me an opportunity and not be in such a hurry I was certain that I could satisfy the Court that the respondent, McFarlane, was the real principal, and the party liable, to which the Magistrate replied: 'What is the nature of your further evidence?' Whereupon I told the Court that the defendant had written me a letter tendering the money in his own name and that he had subsequently appeared at my office and admitted personally that the chaff was purchased for his account, and had also there in his own name tendered the money and had accepted a receipt in his own name, not saying anything about Beyers. I further stated that plaintiff's son had been subpoenaed to give evidence and could speak to defendant's having on two separate occasions tendered the money, less the value of certain wool bags which he alleged were not returned, but the Magistrate said such evidence was beside the issue as plaintiff by his own evidence must prove the defendant liable and stated that he declined to hear such evidence. I then applied in open court, and before judgment, that such tender of further evidence should be noted, as also the refusal to hear such further evidence. This application the Magistrate refused and pronounced absolution from the instance with costs and at once left the Bench.

"When the Magistrate was in the act of leaving the Bench, I again insisted on the importance of the note on record that I had tendered the foregoing evidence, and that the Court had refused to hear me, but he again declined to add this. I called on the Magistrate at his office and renewed my application but without avail. . . ."

The Magistrate in his answering affidavit deposed *inter alia* as follows: ". . . Plaintiff's attorney did not formally tender his or any other evidence further than mentioning that he could produce evidence, nor did he ask me to note any refusal to accept such alleged tender during the hearing of the said suit.

"Immediately upon my giving judgment and whilst I was recording same plaintiff's attorney precipitately left the Court in company with his client. Thereafter and after I had left the Bench, and whilst in the act of leaving the Court, plaintiff's attorney hurried back and for the first time asked me to note of record the

fact that he had tendered further evidence during the hearing of the case and that I had refused to note the same, which request I refused for the reason that I had already left the Bench and that such request should have been made at the time the alleged tender and refusal took place."

Several affidavits were filed on both sides, those on behalf of the applicant supported Mr. Krige's version whereas those sworn to by the respondent's witnesses supported the Magistrate's statement as to what actually took place.

Mr. Juta, Q.C., was heard in support of the application.

Mr. Innes, Q.C., for the respondent (the Resident Magistrate).

The application was refused with costs.

The Chief Justice said: In the case of *Kock v. Zackon* (5 Sheil, 155), it was remarked that if a magistrate refuses to perform his duty there is a means of compelling him to do so, but that the evidence of his refusal must be clear and conclusive. In the present case it is impossible to say that the evidence as to the Magistrate's refusal to accept the evidence alleged to have been tendered is clear and conclusive. On the one side we have the affidavits of the plaintiff and his witnesses, and on the other side those of the Magistrate and his witnesses, and they contradict each other on the very material point as to whether a tender of evidence was made before or after absolution from the instance had been granted. But even the applicant himself does not allege that there had been any formal tender of witnesses at all. What Mr. Krige, the attorney for the plaintiff, ought to have done was this—when absolution from the instance was asked, he ought simply, without entering into any argument, to have said, "I have not closed my case and I now tender such and such a witness to give evidence." If the Magistrate then refused, he should then have said, "Be kind enough to take a note that my witness was tendered and that you refused to take the evidence." That is what Mr. Krige should have done, and I am perfectly satisfied that if he had done that the Magistrate could not and would not have refused to allow the evidence. But there was certainly a misunderstanding on the part of the Magistrate, even if Mr. Krige's evidence is correct. The Magistrate did not understand that there was a tender. The course of conduct I have indicated as being the correct one, was pointed out in the case of *Kock v. Zackon*, decided in May last, many months before the decision in this case, and if the parties had read that decision, I have no doubt Mr. Krige would have adopted

the course indicated there. As to any wilful desire on the part of the Magistrate to refuse justice to the plaintiff, I don't believe it. It is quite true that the Magistrate, when he had given absolution from the instance, refused to make a note of the tender of further evidence. I think myself it would have been better if he had still allowed the request, and raised no objection to note on the record the fact that before absolution from the instance was granted the plaintiff had said that he could produce further evidence, but that he (the Magistrate) was of opinion that such evidence would not affect his judgment. I think it would have been very much better to have done that, but that he was strictly bound in law to do so I am not prepared to say. Unless there was a formal tender of evidence, the Magistrate would not be bound strictly to make such a note in the record. Under these circumstances, as there is a conflict of evidence, we can only now look to the strict legal duties of all parties; the strict duty of Mr. Krige was to formally tender evidence, and the strict duty of the Magistrate was to admit the evidence or make a note on the record that he had refused to admit it. I think, therefore, that Mr. Krige, by not taking the course indicated in *Kock's* case, has put himself in the wrong, and this application must be refused with costs. The amount in dispute is so small that it would have been a travesty of justice, quite independently of the merits, to have allowed three different sets of proceedings to take place in this Court for the purpose of deciding a paltry question of 18s., which does not even involve any important principle in law. The result of allowing this appeal would have been two further appeals in this Court and another hearing before the Magistrate, involving an expense of probably upwards of £60, in order to decide a question of 18s.

Mr. Justice Buchanan concurred, and pointed out that the Magistrate's judgment of absolution from the instance did not debar the plaintiff from further remedy.

[Applicant's Attorney, G. Montgomery-Walker; Respondents' Attorney, Paul de Villiers.]

REGINA V. LOFTUS. { 1895.
Dec. 2nd.

Voluntary escape—Indictment—Abrogation of laws—Disuse.

The matron of a prison was lawfully directed to convey a female prisoner from one gaol to another and on the way she voluntarily allowed the prisoner to escape.

She was indicted for "voluntary escape" and convicted.

Held, upon a question reserved, that the indictment disclosed a criminal offence according to the law of this colony.

Held, further, that the punishment for the offence is discretionary.

Argument on a point reserved at the last Criminal Sessions. The prisoner was tried and convicted on the following indictment:

That Mary Ann Loftus, an assistant matron of the Wynberg prison, residing at Wynberg, in the district of Wynberg, is guilty of the crime of *voluntary escape*:—In that, whereas, upon the eighteenth and twenty-second days of July, in the year of Our Lord one thousand eight hundred and ninety-five, and at Wynberg aforesaid, one Manatie Mahomet was duly convicted by the Court of the Resident Magistrate of Wynberg of the crimes of theft by means of false pretences and theft respectively, and sentenced by the judgment of the said Court to be imprisoned and kept to hard labour for periods of one month and three months respectively, which said judgment remains in full force and effect, and not in the least reversed or made void; and whereas the said Manatie Mahomet was upon the dates aforesaid duly committed by the said Court to the care and custody of the gaoler of Her Majesty's gaol at Wynberg aforesaid by warrants bearing the dates aforesaid respectively, there to be kept and imprisoned in the said gaol to and in pursuance of the judgment and sentence aforesaid; and whereas, upon or about the second day of August in the said year, under the provisions of the sixth section of the Convict Station and Prisons Management Act, 1888, the said Manatie Mahomet was, by direction of the Colonial Secretary, being the Minister referred to in the said Act, authorised to be removed from the said gaol at Wynberg to the House of Correction in Cape Town; and in that, afterwards, to wit, upon or about the sixth day of the said month of August and at Wynberg aforesaid, in pursuance of the said direction of the said Colonial Secretary, the said Manatie Mahomet was delivered into the custody of the said Mary Ann Loftus, who, moreover, then and there duly received, in accordance with the seventh section of the aforesaid Act, the aforesaid warrants for transmission to the matron of the House of Correction in Cape Town; and the said Mary Ann Loftus became, and was then and there and thereby, duly authorised as such assistant matron to receive and safely keep the said

Manatie Mahomet, for the purpose of removing the said Manatie Mahomet from the said gaol at Wynberg to the House of Correction at Cape Town, and in that, upon the said sixth day of August and at Cape Town, while the said Manatie Mahomet was so in the custody of the said Mary Ann Loftus, as such assistant matron as aforesaid, the said Mary Ann Loftus did wrongfully, unlawfully, voluntarily and contemptuously permit and suffer the said Manatie Mahomet to escape, and go at large whithersoever she would; whereby the said Manatie Mahomet did escape out of the custody of her the said Mary Ann Loftus, and go at large whithersoever she would, contrary to the duty of her the said Mary Ann Loftus, so being an assistant matron as aforesaid.

The prisoner was sentenced to pay a fine of £10, but the Chief Justice, who presided at the trial, reserved for the consideration of the Supreme Court the question whether the indictment disclosed a crime known to our law.

Mr. Watermeyer, for the prisoner: It is clear that under the Roman-Dutch law as it prevailed in Holland a gaoler, who allowed a prisoner in his custody to escape, could be punished. *Van der Linden* (2, 4, 6); *Voet* (48, 3, 8) says that the gaoler is liable to the same punishment as the escaped prisoner. See also the *Placaat*, 25th July, 1754 (G.P.B., Vol. 8, p. 769) and *Groenewegen* (Ad. Cod. 9, 4, 4). The only question to be determined is whether this is still the law of the Colony. The punishment for the offence has become obsolete, and the Crown cannot show any convictions under a similar indictment, certainly not for a great many years. The *dicta* of the Roman-Dutch writers referred to have not received the sanction of our Courts. There is one similar indictment reported—*Queen v. Moses* (1 E.D.C. 43)—but in that case the prisoner was acquitted on the facts, so that the law point was not raised. In *Seavill v. Colley* (1 Shell, 820) the question arose as to whether disuse could abrogate a law admitted once to have been binding, and the question was answered in the affirmative.

If a once well-established law is abrogated by disuse, it is submitted that a direct legislative enactment or any definite law must be held to have superseded the old law unless it is expressly retained. Several Statutes have been passed dealing with the discipline and safe custody of prisoners. In 1888 the Legislature consolidated the entire law on the subject and Act 23 of 1888 was passed. By that Act all existing Statutes dealing with the discipline and safe custody of prisoners, and all laws repugnant to or inconsistent with that Act were repealed. It is therefore a fair presumption that that Act

having embodied the entire law on the subject the old Dutch law has been tacitly repealed.

The Statute deals specially with aiding prisons to escape, sections 35, 48 and 50. The old law may not be absolutely inconsistent with or repugnant to the Act but it is certainly inconsistent with the spirit of the Act.

Further in penal Statutes when the Legislature intends to retain the old law it is usually done so in express terms. See Act 28 of 1888, section 40. There is no similar provision in the Act 28 of 1888, and therefore as the entire law is embodied in that Act no accused person can be charged under the old common law.

Lastly as to the form of the indictment: The crime charged is "voluntary escape," an offence unknown to our law under that term. "Voluntary escape" is a purely technical term of the English law and has never yet been recognised in our law. See *Queen v. Enslin* (2 App. Cas., 69).

Mr. Giddy, for the Crown, was not heard.

The point reserved was decided against the prisoner.

De Villiers, C. J.: The Court is much indebted to Mr. Watermeyer for arguing this case on behalf of the prisoner at the request of the Court, and he has very fully discussed the law bearing on the case. He has urged three grounds for holding that the indictment does not disclose an offence against the law: first, that the law creating the offence is obsolete; second, that it has been tacitly repealed by a new statute dealing with such offences against prison discipline; and third, that it has not been described by its proper and distinctive appellation. As to the first ground he relies upon the case of *Seaville v. Colley* (1 Sheil, 320: 9 Juta, 39). There, however, the Court had to deal with an old law which was inconsistent with well-established and reasonable custom, and which, although it related to matters of everyday occurrence, had never been recognised by any decision of the Court. The custom of receiving from debtors payment in full of debts sold and ceded for less than their nominal value stands on a very different footing from a breach of duty by a public officer having the lawful custody of a prisoner, which, happily, is of rare occurrence in this colony. In that case reference was made to the abolition by disuse of some of the barbarous punishments which disfigured the Dutch law, and it is possible that disuse may put an end to some of the old Dutch laws creating particular offences. The instance of adultery has been mentioned, but no decision on the point is now required. It is sufficient to say that it is an offence of the most frequent occurrence, and that there is no instance on

record of its being punished as a criminal offence. It is an offence by one private individual against another, whereas the offence of allowing a prisoner to escape from lawful custody is a crime committed against public order and security by an official charged with a public duty. None of the reasons which justify the abolition of a law by disuse apply to such a case and the first objection to the indictment fails. The second ground of objection is that Act 28 of 1888, which consolidates the law relating to prisons, puts an end to the common law offence of allowing a prisoner's escape. That Act either furnishes a penalty for the offence or it does not. If it furnishes a penalty, regard must be had to the terms of the Act in order to ascertain whether the punishment is in substitution for or in addition to the punishment provided by the common law. Upon this point I need only refer to my remarks in *Central Railways v. Nothling* (8 Juta, 28). If the Act does not furnish a penalty for the offence, it probably was for the very good reason that the common law provides adequate punishment. I cannot, however, find any reference in the Act to the offence. The section which approaches most nearly to a definition of the offence actually committed by the appellant is the 35th, but that only refers to active assistance rendered to enable a prisoner to escape. The utmost the appellant can be said to have done was to connive at the escape of a prisoner in her lawful custody, and if her position as matron of the Wynberg gaol made her a police constable the 30th section of Act 12 of 1882 might have applied, but the proviso to the section expressly reserves the right of punishing the offender under any other law in force in the Colony. In the absence of any indication in the statute law of an intention on the part of the Legislature to abolish the common law offence, I am of opinion that the second objection to the indictment also fails. The third objection is that "voluntary escape," with which the prisoner is charged, is not an offence known to the law of the Colony. It is not alleged that the facts set forth in the indictment in terms of the 37th Rule of Court are insufficient to constitute the common law offence of allowing a prisoner to escape, but the objection is that the crime charged is not set forth "by its legal and distinctive appellation" in terms of the 56th Rule of Court. As our indictments must be in the English language, it is impossible to use the very appellation used in the Dutch Courts. For offences described by a single word in the Dutch law it is not difficult to find an English equivalent, such as "theft" for "diefstal," but where the Dutch law only furnishes a more or less

lengthy definition the nearest English equivalent must be found. "Voluntarily allowing an escape" would be a very clumsy appellation, and instead of it the expression "voluntary escape" has been borrowed from the English law and used in the indictment. It is a somewhat ungrammatical expression as applied to a person who allows another to escape, but it is sufficiently intelligible, more especially when read in connection with the description of the offence contained in the indictment. The objection raised in *Queen v. Enslin* (2 A.C.C., 69) does not apply in the present case, for there the facts set forth in the indictment were held not to constitute the crime charged, viz., that of "arson." That term would properly have been used if the offence had been that of burning a house, but the burning of a haystack was held not to constitute "arson." The third objection cannot therefore be sustained. As to the punishment, the peculiar circumstances of the case justified the moderate fine which has been imposed. In the Roman law and earlier Dutch law a gaoler who allowed a prisoner to escape was liable, under certain circumstances, to the same punishment as the prisoner himself, but we have the authority of *Groenewegen* (*Ad. Cod.* 9, 4, 4) and *Voet* (*Comm.* 48, 3, 8) that in their time the punishment was discretionary. The question reserved must be answered in favour of the prosecution.

IN THE INSOLVENT ESTATE OF RICHARD PERRIN.

Mr. Close moved for leave to the Master to call a special meeting for the appointment of a new trustee, in lieu of the trustee deceased.

The order was granted.

SUPREME COURT

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

Ex parte HENRY WILSON. { 1895.
Dec. 3rd.

Mr. Graham, as a matter of urgency, applied for an order restraining the manager of the Standard Bank, Cape Town, from parting with certain moneys, remitted from England to Ernest Elliott, otherwise Ernest Henry. Wilson had advanced to Elliott the sum of £90, and received from him an order on the Standard Bank to pay over the remittances to him (Wilson) until the debt was discharged. Subsequently

Wilson lent further moneys, making the total debt £117. Elliott then deposited jewellery with him, of the value of £80 or £90. Only £9 had been paid by the bank to Wilson, and Elliott had now cancelled the order on the bank and was about to leave the Colony. If the jewellery was sold it would leave a balance due of about £17.

In the course of the application the Chief Justice said that the Court had always hesitated to interfere between a bank and its customers.

The application was refused.

The Chief Justice said: The Court is not inclined to interfere. If people choose to make imprudent loans of this kind they cannot expect the Court to go out of its way to give extraordinary remedies. It is a matter now between the bank and its customer, and I do not think the Court ought to interfere with the ordinary relations between the two.

NEL V. NEL'S EXECUTRIX. { 1895.
Dec. 3rd.
" 4th.

Will — Intention — Vesting — Usufruct — *Fidei-commisum* — Legacy — Intestate succession.

By the joint will of N. and his wife certain farms were bequeathed to their sons, after the death of the surviving testator, for a certain sum to be paid to the daughters of the testators.

This and other portions of the will indicated an intention to defer the enjoyment of the legacy but not to postpone its vesting until the death of the surviving testator, but the will contained an obscure clause which the Court construed to mean that the survivor should have the right to reduce the amount to be paid by the sons for the farms.

Held, that this provision did not indicate any intention to postpone the vesting until the survivor's death.

One of the sons died intestate and without issue after his mother, the testatrix, but before his father, the surviving testator.

Held, that his heirs ab intestato were his father and his brothers and sisters, and that his interest in the legacy passed to such heirs.

This was an action instituted by Joachim Elias Petrus Nel, Jacobus Christian Joachim Nel, and Carel Gert Steenkamp Nel against

Martha Margaretha Wilhelmina Maria Nel (born Steenkamp) in her capacity as the executrix testamentary to the estate of her late husband, Johannes Carl Casparus Willem Nel.

The declaration alleged that:

1. The plaintiffs reside in Calvinia, and are stepsons of the defendant, who is the duly confirmed executrix testamentary to the estate of her late husband, Johannes Carel Willem Casparus Nel, hereinafter called the testator.

2. On or about the 24th October, 1861, the testator, who was then married in community of property to Maria Johanna Jacoba Nel, the plaintiff's mother, made a mutual will, by which the testators bequeathed the prelegacies set out in the schedule hereto and marked "A." The testators then appointed each other, that is, the first dying the survivor, his or her sole and universal heir of all property left at the death of the first dying, subject to the survivor maintaining and supporting their children until marriage or majority, when in the place of father's or mother's portion the survivor should pay out such amount as he or she should according to the estate find to be due, for which purpose the survivor within three months after the death of the first dying was bound to have the estate valued.

3. The said Maria Johanna Jacoba Nel died on the 26th November, 1863, leaving the said will of full force and effect, and leaving four sons, namely, the three plaintiffs and their brother Jacob Willem Stephanus Nel, and the plaintiffs' said grandfather her surviving. The said Jacob Willem Stephanus Nel died in 1864, leaving no issue.

4. The testator adiated and accepted benefits under the said will, and remained in possession of the farms prelegated as aforesaid.

5. Thereafter the testator married the defendant in community of property, and executed with her a mutual will, by which he bequeathed one-fourth share of the said prelegated farms, of which the testator had remained in possession, to the children of the male sex born of his second marriage, subject to a life usufruct thereof in favour of the defendant.

6. The plaintiffs' said grandfather, Jacob Willem Stephanus Nel (Jacobus son), died in the year 1865.

7. The testator died in October, 1879, whereupon the plaintiffs became entitled to transfer of the prelegated farms, and in the year 1894, upon payment by each of the plaintiffs of the sum of £377 10s., transfer was passed to them of three-fourths of the said farms.

8. The plaintiffs are ready and willing to pay, and have tendered to the defendant, the sum of £377 10s., upon receiving transfer of the re-

maining one-fourth of the said farms, but the defendant refuses to give transfer thereof to the plaintiffs, and claims to be entitled to dispose of the same in terms of the will in the fifth paragraph mentioned.

9. Wherefore the plaintiffs claim:

(a) Transfer of the remaining one-fourth share of the prelegated farms, they tendering payment of the sum of £377 10s., in terms of the mutual will of 1861.

(b) Alternative relief and costs.

The defendant denied that the plaintiffs ever became entitled or are now entitled to the transfer of the whole of the farms, and specially pleaded that upon the death of the testator in November, 1883, and upon adiation by the testator, the right to one-quarter share of the farms was vested in Jacob W. S. Nel, subject to the life usufruct of the testator and of the grandfather of the plaintiffs, and upon the death of the said Jacob W. S. Nel, intestate and without issue, the half of the quarter share, subject to the usufruct aforesaid, became an asset in the estate of the testator, and was rightly dealt with under his second will, the other half of the said share fell to be divided among the brothers and sisters of the said J. W. S. Nel who were alive at his death. She alleged that she was ready and willing to transfer one-eighth of the said farms to the executor dative of the said J. W. S. Nel to be dealt with according to law.

She admitted the tender of £377 10s. and that she refused to transfer the said quarter of the farms to the plaintiffs.

The replication was general.

There was no oral evidence led on either side.

Mr. Juta, Q.C., for the plaintiffs, cited *Booyesen v. Colonial Orphan Chamber* (Foord, 48).

Mr. Rose-Innes, Q.C., for the defendant, relied on *Rahl v. De Jager* (1 Juta, 38) and *Strydom v. Strydom's Trustee* (4 Sheil, 429).

De Villiers, C.J.: Since the adjournment I have read the will in the original in order to discover, if possible, the true meaning of a somewhat obscure clause of the will. The remaining clauses of the will dealing with the legacy indicate a desire on the testators' part to defer the enjoyment of the legacy but not to postpone the vesting. Then follows this clause: "Lastly, we (both the testators) declare that it shall be competent for the survivor of us both to make any alterations in the farms bequeathed by us according to our desires and the state of the estate, that is to say, the heirs procreated of this marriage." Grammatically this clause is quite unintelligible. The farms had been bequeathed to the sons of the testators after the death of the surviving testator subject to

the payment by such sons of a certain sum of money for the benefit of the daughters of the testators. The clause just quoted, if it has any meaning at all, can only mean that the surviving testator shall have the right, having regard to the condition of the estate, to reduce the amount to be paid by the sons for the farms. Such a provision cannot be held to indicate any intention to prevent the vesting of the legacy before the death of the survivor. On behalf of the plaintiffs, Mr. Juts mainly relies on the case of *Beoyson v. Colonial Orphan Chamber* (Foord's Rep. 48). The real point there decided was that, inasmuch as the land there in question had never vested in the first dying testator, the legatees had acquired no such real rights as to enable them to follow the land into the hands of *bona-fide* alienees without notice of any *fidei-commisum* created by the terms of the joint will. The whole argument proceeded upon the assumption that a *fidei-commisum* had been intended and the Court decided that, even if the assumption was correct, the plaintiffs had acquired no right of vindication in respect of the land. In the present case one of the legatees, Jacob Nel, died after the first dying testator but before the surviving testator. The plaintiffs, as his co-legatees, claim that by virtue of the *jus accrescendi* his share of the farms accrues to them. The defendant as the executrix of the surviving testator contends that on his mother's death Jacob Nel acquired a vested interest in the legacy and that upon his death, intestate and without issue, one half of such interest passed to his father (the surviving testator) and the other half to his brothers and sisters. This contention appears to me to be quite consistent with *Strydom v. Strydom's Trustees* (4 Sheil, 429) and to be otherwise perfectly correct. The judgment of the Court must therefore be for the defendant with costs.

Their lordships concurred.

[Plaintiffs' Attorneys, Messrs. Van Zyl & Buissinné; Defendant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

MARDT V. HICKSON, SON AND CO. { 1895.
Dec. 4th.

Magistrate's jurisdiction—Act 20 of 1856, Schedule B, Rules 8, 9, and 29—Re-opening case—Summons—Service.

H. & Co., resident in the district of Cape Town, sued M. in the Resident Magistrate's Court, Wynberg, obtained provisional judgment against him, and issued a writ of execution.

Thereafter M. issued a summons out of the Wynberg Court under Act 20 of 1856, Schedule B, Rule 29, calling upon H. & Co. to show cause why the case should not be re-opened.

The summons was served at H. & Co.'s place of business in Cape Town by the deputy messenger of the Cape Town Court.

At the hearing H. & Co. excepted to the summons on the grounds (1) that it had not been legally served upon them by the messenger of the Wynberg Court, and (2) that they did not reside within the jurisdiction of the Wynberg Court.

The Magistrate sustained both the exceptions, and dismissed the summons with costs.

Held, on appeal, reversing the Magistrate's decision, (1) that the service was good, and (2) that as H. & Co. had selected the Wynberg Court as their forum in the first case they could not in the second case object to the Magistrate's jurisdiction.

This was an appeal from a decision of the Resident Magistrate of Wynberg, in a case heard before him on the 17th October, 1895, in which the present appellant, plaintiff in the Court below, summoned the respondents (defendants) to show cause why a certain judgment of a provisional nature obtained by them against him in the Court of the Resident Magistrate of Wynberg on the 15th August last, and in execution of which a writ of attachment was issued on the 6th September last, should not be reopened and set aside on the grounds, *inter alia*, as the summons alleged, that the said Mardt was by just and reasonable cause prevented from attending the Court at the hearing of the case, and whereas he denies being indebted to the said Hickson, Son & Co. as aforesaid. Also to show cause why the said judgment should not be reversed with costs.

The summons was served on Miss Hickson, the respondent's daughter, at the firm's place of business in Cape Town by the deputy messenger of the Resident Magistrate's Court, Cape Town. The respondents excepted to the summons (1) as it had not been legally served by the messenger of the Wynberg Court, and (2) that the defendants did not reside within the jurisdiction of the Court.

Evidence was taken on the exception, and it was proved that the summons was not served by the messenger of the Wynberg Court, or by his lawful deputy, and that the defendants did not

reside within the jurisdiction of the Wynberg Court, their residence being in Woodstock.

Both exceptions were sustained with costs, and from this decision the plaintiff now appealed.

Mr. Graham was heard in support of the appeal.

Mr. Sheil, for the respondents: It is submitted that both exceptions were correctly sustained. As to the first, see Act 20 of 1856, Schedule B, Rules 8 and 9. As to the second, see section 8 of the same Act and *Boodle & Co. v. Bowley* (5 Sheil, 412).

The Court allowed the appeal, and remitted the case to be decided on its merits.

The Chief Justice said: The plaintiffs in this case selected their forum and sued the defendant in the Wynberg Court. The defendant now wishes to avail himself of the provisions of the 29th rule of Court by re-opening the case. The only Court that can reopen the case is the Court which gave the original judgment: that is, the Court of the Resident Magistrate of Wynberg. The defendant, then, wishes to reopen it, and the summons for reopening it is served upon the plaintiffs by the deputy messenger of the Cape Town Court, and this service is now said to be defective. I think it would have been still more objectionable if the messenger of the Wynberg Court had effected service, because then the objection could have been raised that the summons was served beyond his district. I think service by the messenger of the district in which the plaintiff lives is sufficient service, and even if it were not, I think that any objection to the service was waived by reason of the plaintiff appearing himself and admitting the service. Then the second exception, that the defendants do not reside within the jurisdiction of the Court, I have already disposed of, because they have chosen the Wynberg forum, and as that is the only Court in which the case can be reopened, they are now properly sued in that Court. The appeal must be allowed with costs, and the case remitted to the Magistrate to be tried on its merits.

[Appellant's Attorney, D. Tennant, jun.; Respondents' Attorney, C. C. Silberbauer.]

RADEMEYER V. VAN DER MERWE. { 1895.
Dec. 4th.

False imprisonment—Malicious prosecution
— Arrest — Summons — Warrant — Summary jurisdiction.

The plaintiff, having been assaulted by the defendant, threatened to assault the defendant whenever he found him, whereupon the defendant caused the plaintiff to be arrested,

handcuffed, and imprisoned by two policemen, but laid no criminal charge against the plaintiff.

In an action for false imprisonment and for malicious prosecution the Magistrate granted absolution from the instance.

Held, on appeal, that inasmuch as the plaintiff's offence, if any, fell within the Magistrate's summary jurisdiction, the plaintiff ought to have been summoned under the 68th Rule of the Magistrates' Courts, and not arrested at the instance of the defendant, without a warrant, and that upon the evidence the defendant was liable in damages for false imprisonment.

This was an appeal from a decision of the Acting Resident Magistrate of Victoria West in an action in which the present appellant, plaintiff in the Court below, sued the respondent, defendant, for £20 damages.

The summons alleged that the defendant, on the 6th October, 1895, falsely and maliciously, and without reasonable and probable cause, had the plaintiff arrested, handcuffed, and lodged in the gaol at Victoria West, and there detained until bailed out and discharged on the 7th October, 1895.

The defendant denied liability and pleaded the general issue.

It appeared from the plaintiff's evidence that on the 6th October last the respondent, who runs a passenger cart between Victoria West and the railway-station, was driving plaintiff and other passengers from the station to the village.

The plaintiff, who was seated on a trunk in front, complained of his uncomfortable position, and said to the defendant that if he (plaintiff) were Mr. Arnholtz, or Mr. Dodds, his master, he would not pay for the seat, as he had to get a seat in the cart, and not on the trunk. Some words then passed between the plaintiff and defendant, and after the latter had driven some distance, he stopped the cart, pushed the plaintiff, and afterwards struck him several blows with his fist on the neck. The plaintiff then got down from the cart, and the defendant drove off.

Another cart came up shortly afterwards, and the driver gave the plaintiff a seat. The second cart overtook the defendant's, and in passing it the plaintiff shouted out, "Kootje van der Merwe, if I get you in the village I will play on your donder," meaning, as the plaintiff admitted in cross-examination, that he would fight the defendant, and give him a thrashing when he met him,

When the cart in which the plaintiff was sitting arrived in the village it was stopped opposite the Commercial Hotel by two policemen, who asked where the man was who got into the cart along the road. The plaintiff then said, "Here I am." The policemen told him to get down from the cart. He got down, and the defendant, who was standing a little distance away, told the policemen to arrest the plaintiff. The policemen then arrested the plaintiff, handcuffed him, and took him over to the gaol, where he remained until he was bailed out.

On the plaintiff's return home he found his wife ill in consequence of the fright which she had received on hearing of her husband's arrest.

The plaintiff appeared before the Magistrate on the following Monday, when the case was dismissed as the prosecutor did not appear.

The plaintiff then instituted the present proceedings.

The Magistrate, after hearing the plaintiff's evidence, without calling any witnesses for the defence, granted absolution from the instance.

The following were his reasons:

1. That it was not proved by plaintiff that the detention was unlawful, or that he was unlawfully arrested.

2. Plaintiff failed to prove that he was maliciously and without reasonable or probable cause arrested. Plaintiff admits in his evidence that he was apprehended for some crime or offence, and failed to prove to my satisfaction the material points required by law in cases of false imprisonment. The plaintiff, on whom the onus rested, failed in this respect, and did not call further witnesses to prove his allegations. I did not think it necessary to call evidence for the defence, and upon application of defendant's agent absolution from the instance was granted with costs, the only course which, in my opinion, I could adopt.

The plaintiff now appealed.

Mr. Sheil in support of the appeal.

No information on oath was laid against the appellant nor was a warrant issued previous to his arrest, consequently his arrest was illegal, as he had done nothing which would justify his summary apprehension.

He could not have been arrested for breach of the peace as no breach had been committed by him, nor could he have been arrested under Ordinance 73, section 12.

If he was arrested under Act 27 of 1882, section 5 (18), the proviso to section 18 was lost sight of.

The only Act he could possibly have been said to have contravened was Act 21 of 1894, section 2, but even if his language was threatening and insulting within the meaning of that section—it was not without provocation—he had received

the greatest provocation which any man can receive—he had been struck several times by the defendant, but even if there had been none, instead of the greatest provocation, no power of summary arrest is given by that Act—the law must be set in motion in the ordinary way, by the issue of a summons or by the issue of a warrant after an information on oath, and this applies to private as well as public provocations. But even if power of summary arrest were given there should have been a summons or at least a notice in writing to show the offence charged. Act 20 of 1856, Rules 63, 64, 68; *Queen v. Cooper* (B. 1879, p. 152); *Willemse and Others v. Lategan* (5 Sheil, 350).

It is therefore clear that the arrest was illegal *ab initio*.

And the only question in this appeal is whether there was such evidence of want of reasonable and probable cause and of malice on the part of the defendant as would justify the Magistrate in awarding the plaintiff some damages for the gross indignities to which he was subjected.

The facts speak for themselves, and show such an utter want of reasonable and probable cause that malice must be presumed.

The plaintiff was entitled to some damages, and it is submitted that the Magistrate erred in granting absolution.

Mr. Graham, for the respondent: The plaintiff should have given some evidence of malice as well as of want of reasonable and probable cause—*Jesson v. Jonas* (10 Juta, 200)—but he gave none and consequently the judgment was correct.

As to the plaintiff's summary arrest, see Act 27 of 1882, section 5 (18).

Mr. Sheil, in reply, referred to the proviso to the 18th section of Act 27 of 1882.

De Villiers, C.J.: It is unnecessary to add much to the remarks made by the Court in *Willemse v. Lategan* (5 Sheil, 350). According to the plaintiff's evidence, which for the purpose of this appeal must be taken to be correct, he had taken his seat in the defendant's passenger cart in the belief that it was to be paid for by a Mr. Dodds. After travelling some distance a quarrel arose about the seat not being comfortable, when the defendant assaulted the plaintiff and pushed him out of the cart, upon which the plaintiff used some threats that he would assault the defendant whenever he found him. The cart proceeded to the village of Victoria West and the plaintiff made his way there as best he could, and on his arrival, he found two policemen waiting to take him into custody at the defendant's instance; he was handcuffed, taken to prison, kept there

all night, and on his return home on the following day he found his wife ill in consequence of the incident. When the case was called on in the Magistrate's Court the defendant did not appear to prosecute and the case was dismissed. The summons claims damages for false imprisonment, but it is wide enough also to embrace a charge of malicious prosecution. The case was clearly not one for arrest without warrant. If the defendant had lodged a complaint with the Magistrate of the threats used against him the proper course for the Magistrate would have been to direct the issue of a summons in terms of the 68th Rule of the Magistrates' Courts and not the issue of a warrant for the plaintiff's arrest. It was a case for the exercise of the Magistrate's summary jurisdiction, in which, according to the views expressed by the Court in the case already cited, a warrant would only have been issued after the offender had failed to appear on the day appointed by the summons. But, without applying either for a summons or for a warrant, the defendant seems to have directed two policemen to arrest and imprison the plaintiff. There was no legal justification, upon the evidence, for such a high-handed proceeding and, unless the plaintiffs' evidence is disproved, the defendant is liable in damages for false imprisonment. The defendant did not by his plea allege that the arrest was ordered by the Magistrate or other judicial officer. If such an allegation were made and proved the question would still remain whether the prosecution was not malicious and without reasonable cause. There is some proof of malice, and the fact that, when the case was called on in court, the defendant did not appear to substantiate any charge he may have made is *prima facie* evidence of want of reasonable and probable cause. The Magistrate ought not, in my opinion, to have granted absolution from the instance. It is quite possible that the defendant's evidence may give a different complexion to the case, but, upon the evidence actually given, the appeal must be allowed, with costs of appeal, and the case remitted to the Court below for trial on its merits. The question of costs in that Court must also be remitted.

Their lordships concurred.

[Appellant's Attorney, S. J. Mostert; Respondent's Attorney, C. C. Silberbauer.]

IN THE ESTATE OF ALBERTUS J. BOLL.

Mr. Molteno applied for an order appointing Mr. Robert George Attwell provisional trustee in this estate, with power to sell perishable goods.

The order was granted.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

STARCK V. STARCK. } 1895.
Dec. 5th.

In this divorce case Mr Sheil, counsel for the plaintiff, intimated that the evidence taken on commission at Johannesburg had not arrived, and he was compelled to apply for a postponement of the hearing.

The hearing was postponed until the first day of February term.

BELL V. BELL. } 1895.
Dec. 5th.

This was an action for divorce on the grounds of the defendant's adultery with certain women referred to in the declaration.

Mr. Graham for the plaintiff.

The defendant did not appear.

Mrs. Alice Bell, the plaintiff, deposed that she was married to the respondent on the 29th October, 1881, in Leicestershire, England. There were no children of the marriage. In 1894 he, with her acquiescence, came out to the Cape in search of employment, with the intention of remaining in the Colony. He obtained a situation in Cape Town, as a fireman, five days after his arrival. He wrote to her regularly and sent her £1 every fortnight. He had, on coming out, left her sufficient money to follow him, and he eventually wrote telling her to come out. She did so, and on arriving in Cape Town last February lived with him as his wife. He was still a fireman. After they had lived together for some time she saw a letter written by a Mary Lewin to her husband, and he subsequently confessed that he had committed adultery with both Mary Lewin and Nellie Mountseer. She produced a letter from her husband to Lewin. She had not cohabited with him since the confession, although she had lived in the same house with him. She had applied to the Court for an order compelling her husband to contribute a sum towards the expenses of the action. The Court refused the order, but he had given her £10. She had nothing on her marriage, but since then she had received £30, of which her husband had the benefit. She now prayed for a return of the £20 balance.

Nellie Mountseer deposed that she first met Bell in December last, and the acquaintance continued until June. There was misconduct between them. She did not know he was a married man.

By the Court: She was a dressmaker, and first met him at her house. There was no arrangement between them that he was to marry her on being divorced. She only knew that the respondent was the man because the plaintiff had told her so.

The Court granted a decree of divorce with costs.

The Chief Justice said: A decree will be granted with costs, but it is worth while in these cases to fortify the evidence as much as possible by the production of photographs or in some other way identifying the defendant. The admission made by the defendant to his wife is strengthened by the letter produced from him to Mary Lewin.

DEARHAM V. DEARHAM. { 1895.
Dec. 5th.

This was an action for restitution of conjugal rights, failing which for divorce, by reason of the defendant's malicious desertion. The parties were married in June, 1870, and in January, 1893, the desertion took place.

Mr. Close for the plaintiff.

The respondent did not appear.

Mr. Norman Lacy, clerk in the Colonial Office, produced the original certificate of the marriage.

Edward Daniel Dearham deposed that he was married to the respondent on the 27th June, 1870, in community of property. They lived together till January, 1893, when she left him. She had stayed out late at nights and went out too often, and he had complained. He subsequently found she had acquired drinking habits. After being away from him for six months she returned, but soon went away again and had never returned. He heard she had gone to Johannesburg. Ten children had been born of the marriage, of whom five were alive, the eldest being twenty-three and the youngest twelve. He was still willing to take her back if she behaved herself. He believed she was now at Johannesburg.

The Court granted a decree as prayed, the defendant to return to the plaintiff on or before the 15th January, 1896, failing which granted a rule calling on the defendant to show cause on the 1st February why a decree of divorce should not be granted, giving the plaintiff the custody of the minor children; and why the defendant should not forfeit all benefits by virtue of the marriage in community of property. Publication to be as before.

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), Mr. Justice BUCHANAN, and Mr. Justice UPINGTON, K.C.M.G.]

CLAREMONT MUNICIPALITY V. THE { 1895.
CAPE TOWN DISTRICT WATER- { Dec. 6th.
WORKS COMPANY, LIMITED.

Water concession—Construction—Municipality.

The Municipality of C. granted A. a concession to supply the Municipality with water. The concession was granted subject to the conditions following:

Clause 5.

The said Ackerman shall place three hydrants at his own cost and charges for the purpose of extinguishing fire at such spots within the said Municipality as the said Council shall indicate, provided such spots are within 60 feet of any main of the said Ackerman, and shall and will supply such quantity of water as the said Council may from time to time require to be supplied for the purpose of extinguishing fires or for other purposes of the said Municipality, such as watering roads, flushing, &c., at the rate of £2 for every 40,000 gallons supplied.

Held, that the words shall and will supply referred only to the three hydrants, and that the Municipality could not compel A. to place as many hydrants as they might think fit, provided the Municipality paid for their erection, and to supply the water at £2 for every 40,000 gallons.

Held, further, on the construction of the same clause, that the Municipality could not compel A. to bring water to the Municipal washhouses, which were situated at a greater distance than 60 feet from one of A.'s mains.

Clauses 2, 3 and 6 were in effect as follows:

The said Ackerman shall be bound to supply such quantity of water, not exceeding 200,000 gallons per diem, as the plaintiff Council and the inhabitants entitled thereto may require, at a price not exceeding £2 10s. per annum for each 100 gallons supplied per diem (clauses 2 and 3).

The said Ackerman shall be bound to lay down and keep in repair all mains in the main road within the said Municipality, and to lay down main or other pipes, exclusive of private water-

leadings, necessary for the efficient supply of water in all streets and thoroughfares at his own cost and charges upon receiving a guarantee from the owners of property within the said Municipality, for whose sake such main or other pipes are laid down, that they will take a supply of water for a term of three years sufficient to yield a return equal to 15 per cent. per annum on the amount expended on the main or other pipes specially laid down for the supply of water to such proprietors (clause 6).

Held, upon the construction of clause 6, that that clause applied only to such ratepayers and inhabitants as required water and were willing to pay for it under clause 2.

This was an action for a declaration of rights. The declaration alleged:

1. That the plaintiff is the Council of the Claremont Municipality, which is constituted under Act 45 of 1882.

2. That the defendant is a private company duly registered in this colony with limited liability and constituted for the purpose *inter alia* of taking up a certain concession for the supply of water to the Claremont Municipality, which concession is dated the 23rd day of October, 1888, and was granted in favour of one Ackerman, then representing a certain syndicate formed for the promotion of the said company.

3. That the said concession was granted upon certain terms and conditions, which thereafter upon its formation and constitution became and now are binding upon the said company, and amongst others are the following conditions now binding upon the company: . . . "The said Ackerman shall and will supply such quantity of water as the said Council may from time to time require to be supplied for the purpose of extinguishing fires, or for other purposes of the said Municipality, such as watering roads, flushing, &c., at the rate of £2 for every 40,000 gallons supplied." . . .

4. Among the purposes of the said Municipality, as provided by section 25 of section 109 of Act 45 of 1882, is the establishing, maintaining, and regulating public washhouses, and the plaintiff has established and is maintaining and regulating such washhouses for the purpose of the Municipality at Claremont.

5. A supply of water for the said washhouses is necessary, and the plaintiff is entitled to demand that the defendant shall until further reasonable notice is given supply for that purpose at the said washhouses the reasonable amount of 3,000 gallons per diem, at the rate of £2 for every 40,000 gallons so supplied, the

plaintiff bearing the expense of the pipe or pipes connecting the said washhouses with the main pipe or pipes of the defendant, which should be laid so as to convey the water to the grounds in which the washhouses are established, but the defendant refuses to comply with the demand of the plaintiff or to supply the said water in manner aforesaid for the purpose of the said washhouses.

6. The plaintiff is entitled to obtain a declaration of rights in respect of the matters aforesaid, and an order compelling the defendant to supply such water as aforesaid for the purposes aforesaid.

The plaintiff prayed for:

1. A declaration of rights, declaring (a) that the plaintiff is entitled for the purposes of the aforesaid washhouses to such reasonable supply of water as from time to time may be reasonably notified to the defendant; (b) that the plaintiff is entitled to have the said water conveyed by the defendant's main pipe or pipes to the grounds whereon the said washhouses are situated, the plaintiff bearing the expense of the connecting pipe or pipes from the said main pipe or pipes to the said washhouses; (c) that plaintiff is entitled to the said supply of water, at the rate of £2 sterling for every 40,000 gallons of water supplied, upon true accounts thereof rendered by the defendant to the plaintiff.

2. An order directing the defendant forthwith, or in such time as to this honourable Court may think just, to supply the plaintiff in manner aforesaid with 3,000 gallons of water per diem, subject to such reasonable notice as aforesaid, for the purposes of the said washhouses, or that the plaintiff may have such further or other relief in the premises as to this Honourable Court may seem meet, together with costs of suit.

The defendants, in their plea, admitted the allegations in paragraphs 1 and 2 of the declaration, save that they said that the defendant company is registered in England and not in the Colony.

As to the third paragraph, they said that the words quoted therein set forth only form a portion of the condition of clause 5 of the concession, and they referred the Court to the full terms of the clause.

They set forth the following provisions of the concession:

(a) The said Ackerman is bound to supply such quantity of water, not exceeding 200,000 gallons per diem, as the plaintiff Council and the inhabitants entitled thereto may require, at a price not exceeding £2 10s. per annum for each 100 gallons supplied per diem (clauses 2 and 3).

(b) The said Ackerman is bound to place three hydrants for the purpose of extinguishing fire at such spots within the said Municipality as the plaintiff Council may indicate, provided such spots are within 60 feet of any main of the said Ackerman, and further to supply such quantity of water, as the plaintiff Council may from time to time require to be supplied for the purpose of extinguishing fires, or for other purposes of the said Municipality, such as watering roads, flushing, &c., at the rate of £2 for every 40,000 gallons supplied (clause 5).

(c) The said Ackerman is bound to lay down and keep in repair all mains in the main road within the said Municipality, and to lay down main or other pipes, exclusive of private water-leadings, necessary for the efficient supply of water to all streets and thoroughfares at his own cost and charges upon receiving a guarantee from the owners of property within the said Municipality for whose sake such main or other pipes are laid down that they will take a supply of water for a term of three years sufficient to yield a return equal to 15 per cent. per annum on the amount expended on the main or other pipes specially laid down for the supply of water to such proprietors (clause 6).

(d) In the event of the said Ackerman being at any time unable or unwilling to supply outlying properties in the said Municipality with water, then and in every such case the Council are entitled to grant facilities to such proprietors for obtaining their water supply elsewhere, provided the distance of the said properties from any of the mains of the said Ackerman shall exceed 400 English yards (clause 7).

All the rights and liabilities of the said Ackerman under the said concessions are now enjoyed by and imposed upon the defendant company.

As to paragraph 4 of the declaration, they denied that water required for use at public washhouses is water required for a purpose of the Municipality within the scope of clause 5 of the concession, and they referred the Court to the terms of sub-section 25, section 109, Act 45 of 1882, but they admitted that the plaintiff Council has established, and is maintaining, public washhouses for the use of inhabitants within the Municipality. They alleged that the said washhouses are situated at a great distance from the main road, and from the places where the hydrants referred to in clause 5 of the concession have been duly fixed, nor are they in any street or thoroughfare, as is referred to in the 6th clause. They are more than 400 yards from any main or other pipe of the defendant com-

pany, and no such guarantee as is in the 6th clause of the concession referred to has been duly offered by the plaintiff Council.

They admitted their refusal to comply with the plaintiffs' demands, but they denied the other allegations in the 5th and 6th paragraphs of the declaration.

The plaintiffs in their replication admitted that the washhouses are more than 400 yards from any main pipe of the defendant company.

As to the guarantee, they said that before the action was brought they guaranteed to take out not less than 3,000 gallons of water per diem at £2 per 40,000 gallons, which amount would annually cover 15 per cent. of the expenses of the pipes laid down for the supply of water to the washhouses, and they said that the defendants had not before their plea demanded any further or more formal guarantee under clause 6 of the concession, but that they (plaintiffs) were ready and willing, and hereby offered to guarantee to the defendant company that they would take a supply of water for a term of three years sufficient to yield a return equal to 15 per cent. per annum on the amount expended in the main or other pipes specially laid down for the supply of water to the washhouses.

Issue was joined on these pleadings.

Mr. Searle, Q.C., and Mr. Sheil appeared for the Council.

Mr. Innes, Q.C., and Mr. Juta, Q.C., for the company.

Mr. Charles Selwyn Powrie deposed that he lived in Lansdowne-road and had been a Councillor of Claremont since the Municipality was formed nine years ago. The washhouses were started two years ago, and were ready for use six months ago. The washhouses were a crying want, and the complaints of clothes-washing taking place in the stream had been many. Owing to the difficulty of arranging the terms on which the water for the washhouses was to be supplied, the water had not been forthcoming, and the washhouses were not in use. [The witness here gave an explanation of the locality, and the present position of the mains.] The hydrants mentioned in the defendant's plea were fixed on the main road some years ago. There were some parts of the Claremont Municipality too high to be supplied from the company's mains, and these properties obtained their supplies from the Wynberg Municipality. It was the intention of the Municipality to stop washing in the Liesbeek stream, and were much put out that they had not been able to do so.

By the Court: He could only account for the omission of the mention of "washhouses" from the Council's agreement with Ackerman, i.e., the company, by the fact that internal differ-

ences in the Council made it difficult for those Councillors who wanted the agreement to get it through at all. It was certainly the intention of the Council that the agreement should include washhouses.

Cross-examined by Mr. Innes: He adhered to his statement that "washhouses" were intended to be included. Washhouses were in his mind when the agreement was entered into in 1888. He was not aware that the company was willing to supply the water if the Council would meet them reasonably as to terms and pay for the meter.

Mr. Innes intimated to the Court that he, would prove that the whole difficulty arose through the Council refusing to pay meter rent a matter of £6 per annum.

Mr. Justice Buchanan: Surely it is impossible they could have come into court about that.

Mr. Searle said such a thing was not mentioned in the declaration nor in the pleas.

Mr. Innes said that would naturally be so, but he would prove by the correspondence that the company had expressed themselves as willing to supply the water if the Council would agree about the meter rent. [Counsel here read the correspondence.]

Cross-examination continued: The correspondence set out the position taken up by the Council. It was stipulated that they need not take the water on Sundays. He did not know if the Council would have contended, had the question arisen, that they need not take water on certain other days of the week unless they wished. There was nothing in the state of the Belvidere-road to prevent the laying of the main for the purpose of supplying the washhouses. Only about 150 yards of the road was not metalled.

This closed the evidence for the plaintiff.

Mr. Thomas Bennett deposed that he was a member of the Institute of Civil Engineers. He had made measurements and found that 226 yards of the road through which the mains to the washhouses would have to run were not yet metalled. He was instructed by the defendant company to commence the mains for the washhouses, but subsequently the operations were stopped because the Council would not agree to pay for a meter, which would cost about £6 a year. It was necessary to have the meter. The principle of having a meter had been recognised in the case of the Claremont Town-hall and of the Rondebosch Municipality and Divisional Council, all of which had meters, and private consumers also had them.

Cross-examined: There might be many meters required in the future, and the question of meters was, therefore, likely to become an important matter.

By the Court: It was the universal practice for the company to supply water and to receive rent for the meter. Even if the meter belonged to the consumer the water company would have control over it, and would charge the consumer for repairing it when necessary.

After argument,

Judgment was delivered for the defendants with costs.

The Chief Justice said: It is greatly to be regretted that the plaintiffs have not accepted the very reasonable offer which has been made by the defendants, because the utmost that can have been said on behalf of the plaintiffs is that there is some obscurity in some of the clauses of the concession and that possibly these clauses might be interpreted in their favour. In my opinion, however, these clauses are reasonably clear. The 2nd and 3rd clauses refer to the rate at which individuals who are supplied with water are to be charged; the 5th clause refers to the rate at which the Council is to be supplied; that rate is less than that at which householders are to be supplied. The 5th clause provides "that the said Ackerman shall place three hydrants at his own cost and charges for the purpose of extinguishing fire at such spots within the said Municipality as the said Council shall indicate, provided such spots are within 60 feet of any main of the said Ackerman, and shall and will supply such quantity of water as the said Council may from time to time require for the purpose of extinguishing fires or for other purposes of the said Municipality, such as watering roads, flushing, &c., at the rate of £2 for every 40,000 gallons supplied." Now the plaintiffs contend that this water is to be supplied whenever the Town Council shall require it within the Municipality, and that three hydrants must be placed at the expense of Ackerman, but that the Town Council may require as many more hydrants as they may think fit, provided they (the Council) pay for their erection. Now, in my opinion, this is not a fair construction to put upon this clause. "Shall and will supply," in my opinion, refers only to the three hydrants mentioned in this clause. That is the only obligation on the company; that any water they may supply to the Council from any of the three hydrants which they are bound to place there shall be supplied at the rate fixed of £2 for every 40,000 gallons. The plaintiffs now require that the company shall bring the water to the washhouses, which are a great deal more than sixty feet from any main, and in my opinion the Council cannot compel them to do so. Then Mr. Searle goes further, and says that under the 6th section

the Council enjoy the same rights as against the company which individuals possess. In my opinion the 6th section does not apply to the water supplied to the Town Council at all. The 6th clause applies to such ratepayers and individuals as require water, and will pay for it in terms of the 2nd section of the concession. Well, if this view is right, then it is quite clear that the plaintiff's action must fail. The effect therefore of this action is that the plaintiffs lose the right to the water altogether, and they allow it to depend on the favour of the company whether they are to have the water for the washhouses at all, whereas if they had accepted the very reasonable offer made they would have had all the water they required, provided they only paid £6 a year for the rent of the meter. Now, in my opinion, if it comes to the question of the meter, it is perfectly clear that the consumer would have to pay for it; so that even if in other respects the construction put upon the concession by the Council was correct, it would be quite clear that the Council must pay for the meter and the company was prepared to let them have the water; but for the present we can say nothing about the meter, because that question does not arise on the pleadings. Judgment must be given for the defendants with costs.

Mr. Justice Buchanan: I concur, and must also express regret that an agreement was not come to, as I suggested during the action between the parties. I consider the company is by no means to blame.

Mr. Justice Upington also concurred.

[Attorneys for the Council, Messrs. McIntyre & Bisset; Attorneys for the Company, Messrs. Fairbridge, Arderne & Lawton.]

PROVISIONAL ROLL.

LANDSBERG V. VAN WYK. { 1895.
Dec. 12th.

Mr. Joubert applied for provisional sentence on the sum of £30, interest overdue.

Granted.

ZEEDEBERG, DUNCAN AND CO. AND OTHERS V. BRAUDE AND CO.

Mr. Buchanan applied for the final adjudication of the defendants' estate.

Mr. Sheil appeared for the second-named defendant, Jacob Lebenstein (who was present in court), and resisted the application on the ground that he was not a partner in the respondent firm.

Braude, the first-named defendant, appeared in person, and said he only wanted eight days in which to pay the debt.

Mr. Sheil intimated that the third defendant had absconded with about £900, with the result that pressure had been brought to bear on Braude.

In answer to the Court, Braude said that Lebenstein was not a partner.

The Court granted time in which to pay until Tuesday, the 17th inst., on which day, if the debt were not paid, evidence would be heard as to the question of the members of the partnership.*

PELZER V. MATONA.

Mr. Watermeyer applied for provisional sentence for the sum of £105, and asked for the property to be declared executable.

Granted.

COLONIAL GOVERNMENT V WRIGHT.

Mr. Giddy applied for the final adjudication of the defendant's estate.

Granted.

GENERAL ESTATE AND ORPHAN CHAMBER V. NIEWOUDT.

Mr. Jones applied for provisional sentence on two mortgage bonds for £300 and £100 respectively, and asked for the property to be declared executable.

Granted.

LOTRIET V. LOTRIET.

Mr. Maskew applied for provisional sentence on the sum of £120 due on a promissory note, with interest.

Granted.

DE VILLIERS V. VAN NIEKERK.

Mr. Maskew applied for provisional sentence on two promissory notes for £300 and £198 respectively, with interest.

Granted.

ILLIQUID ROLL.

PETERSON V. DE KOCK.

Mr. Watermeyer moved for costs under rule 329, the capital sum having been paid after the issue of summons.

Granted.

* On the 17th December the matter, at the plaintiffs' request, was postponed *sine die*.—REP.

WRIGHT V. SNELLING.

Mr. Molteno moved, under rule 329, for costs only, the capital sum having been paid.
Granted.

DAVISON V. VAUGHAN.

Mr. Maskew moved, under rule 329, for judgment on the sum of £44 7s. 6d. and costs.
Granted.

Ex parte VERMOOTEN. { 1895.
Dec. 12th.
" 17th.

Articled clerk—Admission—Continuous service.

Articled clerk, who had been articled for over three years, but who had only served two years and three months continuously under the direct supervision of the attorney to whom he was articled, ordered to serve a further period of nine months.

Application by Octavius Septimus Vermooten for admission as an attorney.

In August, 1891, Mr. Van den Heever, attorney-at-law, of Burghersdorp, engaged the applicant as a clerk. Previous to that date the applicant had served as a clerk in the offices of Messrs. Hudson, attorneys and notaries, of Johannesburg, for a term of one year. Mr. Van den Heever alleged that when the applicant joined him he found that Vermooten was well acquainted with the every-day practice of an attorney and quite competent to take charge of a small country business.

That the applicant took charge of his business at Venterstad, a village about four and a half hours from Burghersdorp, from August, 1891, to February, 1892, without being articled.

That in February, 1892, the applicant expressed his desire to become articled, and on the 19th February, 1892, his articles were signed.

The applicant virtually remained in charge at Venterstad from 19th February, 1892, to the end of November, 1892.

In the beginning of December, 1892, the applicant returned to Burghersdorp for good, and remained under the immediate supervision of Mr. Van den Heever until 8th March, 1895.

From the last-mentioned date until the present the applicant had been conducting the business at Venterstad.

Mr. Graham moved.

Mr. Searle, Q.C., opposed on behalf of the Incorporated Law Society and relied on Rule of Court 149: *In re Badenhorst* and *In re Scheepers* (8 Juta, 1 and 145).

The Court refused the application,

The Chief Justice said: There have been definite decisions that the kind of instruction given to the applicant is not that contemplated by the Act. The instruction must be imparted personally by the attorney to whom the clerk is articled; not on occasional business, but during residence at the same place. The application must be refused, and the applicant must serve his apprenticeship for the full period; that is nine months more.*

[Applicant's Attorney, G. Montgomery-Walker; Attorneys for the Law Society, Messrs. Van Zyl & Buissinné.]

Ex parte HARTOG.

Mr. Buchanan moved for the admission of Mr. Charles Edward Hartog as an attorney and notary, the oaths to be taken at Vryburg.

Granted.

REHABILITATIONS.

Ex parte WALDER.

Mr. Jones applied for the rehabilitation of Ferdinand Walder, sen.

Granted.

Ex parte DREYER. { 1895.
Dec. 12th.

Insolvency—Rehabilitation.

The Court granted the rehabilitation of an insolvent the account in whose estate had not been confirmed owing to the negligence of the trustee, who had died previous to the date of the application.

Application for the rehabilitation of the insolvent, Frederick William Dreyer.

The estate was surrendered in 1883, the liabilities as per schedules amounting to £2,576 and the assets to £2,056, leaving a deficiency of £520.

One J. S. Swemmer, who died in 1894, was elected trustee. At the third meeting of creditors the insolvent was given permission to trade on his own account.

The first account was filed on the 16th May, 1885, but was never confirmed. The assets consisted principally of landed property, being a portion of the farm "Ruigtevallis," Knysna, and four erven, also at Knysna, valued at £1,350.

Both properties were mortgaged and were sold by the trustee to the mortgagees, the first

* Afterwards, on the 17th December, the applicant was admitted as a notary.—REP.

being sold for £111, which amount was brought up in the account, the second was taken over by the mortgagee for £309 in full settlement of his bond of £550 and interest, this latter amount was not brought up in the account.

The trustee accounted for all the assets with the exception of the above-mentioned sum of £309.

When the certificate to trade was given to the insolvent he was informed by the trustee that he would have no difficulty in obtaining his discharge when he applied for it.

Mr. Tredgold moved, and in support of the application cited *Ex parte Newlands* (3 Sheil, 297).

The Court granted the order as prayed.

[Applicant's Attorney, D. Tennant, jun.]

GENERAL MOTIONS.

IN THE ESTATE OF THE LATE HENRY H. FORD.

Mr. Smuts moved for an order making absolute the rule *nisi* for payment to the executor dative of the said estate of certain sums of money in the hands of the Master of the Supreme Court, being the surplus proceeds of the sale in execution for the rates due thereon of four lots of grounds at Port Elizabeth, registered in the name of the said Ford, but abandoned and left derelict.

Granted.

THE ALIWAL NORTH BOARD OF EXECUTORS.

Mr. Molteno moved for an order in terms of the third report of the official liquidator.

Granted.

IN THE MATTER OF THE MINORS HUNTER.

Mr. Graham moved for authority to the father of the said minors to appear before the Registrar of Deeds and accept on their behalf as a donation, transfer of a two-fifths share in certain landed property in Woodstock, and for leave to mortgage the same to cover the proportion of the existing bond and expenses, the usufruct of the said property to be paid to the parents during their lifetime.

Granted.

HARTMANN V. HARTMANN. { 1895.
Dec. 12th.

Costs of appearance—Marriage in community
—Separation—Mortgage by wife.

Where a woman married in community of property, and separated from her husband under a notarial deed, sought to mortgage

property, which had been acquired by her subsequent to the date of separation, without the assistance of her husband, and the latter appeared for the purpose of having a clause inserted in the bond freeing him from liability, the Court allowed him his costs of appearance.

This was the petition of Wilhelmina Hartmann married in community to Simon Hartmann but living separate and apart under a deed of separation dated 12th October, 1893.

On the 6th March, 1894, the petitioner purchased a certain lot of ground situate at Wynberg in respect of which she had negotiated a loan of £50.

The Registrar of Deeds declined to register the bond upon the petitioner's signature without the assistance of her husband, notwithstanding the fact that the petitioner is a public trader.

The prayer was that the Court would authorise the Registrar of Deeds to register the bond on the petitioner's signature only, and would also authorise her to deal with the property at any future time.

The petitioner's husband filed an affidavit in which he alleged that he had no objection to the prayer being granted provided it was declared by the Court that he should not be responsible in any way for the amount of the bond and provided that no other liability attached to him in connection with the future dealings of his wife.

He prayed that if the Court granted the petitioner's prayer it should be subject to the above conditions, and that his costs of appearance should be defrayed by her.

Mr. Graham moved, and informed the Court that the mortgagee was willing that the condition insisted upon by the respondent should be inserted in the bond.

Mr. Molteno, for the respondent, was heard on the question of costs.

The Court made no order.

The Chief Justice said: There will be no order, except that the respondent is to have his costs of appearance, seeing that the applicant asked for a great deal more than she was entitled to, and that the respondent was therefore bound to come into court. There will be no order on the application, except as to these costs, on the understanding that the respondent will assist his wife in passing this bond, which will contain a clause relieving the respondent from any responsibility toward the mortgagee.

[Applicant's Attorney, Gus. Trollip; Respondent's Attorney, C. C. Silberbauer.]

**IN THE MATTER OF CORNELIUS F. BOTHA, AN
ALLEGED LUNATIC.**

Mr. Giddy moved for the appointment of a *curator ad litem* to represent the said Botha in proceedings about to be instituted by the Colonial Government, to have him declared of unsound mind, and an order granted for the administration of his estate and effects.

The Court granted the application, and appointed Mr. Suits as *curator ad litem*, order returnable on Tuesday, the 17th instant.

MADDISON V. BOSMAN.

Mr. Graham moved on behalf of the defendant for leave to sign judgment against the plaintiff in the suit between the parties by reason of his failure to proceed with the same within the time prescribed by the rules of Court.

Mr. Innes, Q.C., for the respondent.

The Chief Justice said: There will be no order on this application, except that the bar be removed, the plaintiff to file his declaration forthwith, and to go to trial next term. The question of costs to stand over.

WILLEMS V. WILLEMS

Mr. Tredgold moved for an order to make absolute the rule *nisi* for dissolution of the marriage subsisting between the parties by reason of respondent's failure to obey the order for restitution to his wife of her conjugal rights.

Granted.

***MARTELL AND CO. V. FREIMOND. } 1895.
Dec. 12th.**

Mr. Innes, Q.C., moved for an order restraining the respondent from selling or exposing for sale any Cognac brandy or liquor in bottles bearing thereon, or from in any way using a certain label alleged to be a colourable imitation of applicant's trade mark and an infringement of his rights.

The respondent had written to the applicants' attorneys practically admitting the infringement and undertaking to discontinue the use of the label complained of.

Mr. Graham for the respondent.

The application was granted.

The Chief Justice said: The letter from the respondent's attorney amounts to a practical

* The label used by the respondent was practically the same as that used by the respondents in *Martell & Co. v. Paul Berg B. W. & S. Co.*, *supra*, p. 20, and as the facts were similar the case is not more fully reported.—REP.

† The facts are fully reported *supra*, p. 392.—REP.

admission that there has been an infringement of the applicant's trade mark, and if there has been an infringement, I think the applicant is entitled to come into court to get his interdict. The Court will therefore grant the interdict with costs up to the date of the letter, but no order as to costs will be made subsequent to that date.

**†LE ROES V. GOLDIE. } 1895.
Dec. 12th.**

Mr. Watermeyer moved for an order requiring respondent to deliver up to applicant the possession of certain windmill, situated in the district of Bredasdorp, which applicant now reclaims by virtue of a judgment of this Court in the appeal between the parties from the Court of the Resident Magistrate for Bredasdorp.

The application was granted.

The Chief Justice said: It is pretty clear that the applicant handed over the mill to the respondent in consequence of the Magistrate's judgment. When this Court, therefore, afterwards declared that the judgment was null and void, inasmuch as the Magistrate had no jurisdiction, the parties had to be placed in the position they were immediately before the Magistrate's judgment. The only doubt I had in this case was whether there was not some proof that the applicant had, by improper means, obtained possession of the mill, but that was not perfectly clear, and that being so, I think the parties ought to be placed in their former position. At that time the applicant was in possession of the mill; therefore he must be placed in possession again, and the order asked for must be granted. At the same time leave must be reserved to the respondent still to bring his action to enforce specific performance of the contract of lease, and in that action he will be entitled to recover the costs of this application if he succeeds. The application is granted with costs, the respondent to give up possession within a fortnight of service of the order.

**In re IRVINE. } 1895.
Dec. 12th.**

Minor—Capital—Investment.

The Court, on being satisfied that it was to the interest of a minor, authorised the investment of a portion of his capital in the purchase of a valuable estate, which had been bequeathed by their father to the minor's half brother, who had died intestate before he had attained his majority, and where there was a strong presumption that the testator intended the estate to remain in his family.

This was the petition of Elizabeth Irvine, the tutrix testamentary of her minor son, aged ten years, Harold Irvine, by letter dated 9th September, 1887.

The minor's father, John James Irvine, died in January, 1887. He had been married three times and by each marriage he had one child.

By his will he bequeathed to his son by his first marriage, John Dodds Pringle Irvine, the Waterford Estate, in extent some 15,160 acres, upon which he had expended a very large sum of money, his intention evidently being that this property should remain in his family.

His eldest son, above referred to, died intestate in England in February, 1892, before attaining his majority. His heirs were his half sister, Ellen Douglas Irvine, a child by the testator's second wife, still a minor, a half brother, Harold Irvine (whose mother was still living and made the present application), and his maternal relatives.

The Waterford Estate has now to be sold in the intestate estate of the late John Dodds Pringle Irvine.

There is deposited in the Guardians' Fund to the credit of the minor Harold Irvine his:

Paternal inheritance	...	...	£16,116	0	0
Fraternal	"	...	4,896	8	1
Interest to 30th June, 1895	...	...	2,319	4	5
Total			£23,331	12	6

There was also due to the minor a fourth share of the value of the Waterford Estate and some further amounts, making his capital between £30,000 and £40,000.

The heirs interested had given their consent to the sale and in order to ascertain the purchase price two valuers were appointed who valued the Waterford Estate at £20,792 10s.

The petitioner prayed for:

(a) An order authorising her to purchase on behalf of her minor son the Waterford Estate (exclusive of the mill and wool wash on the estate already sold) for the sum of £20,792 10s. from the executor dative of the late John Dodds Pringle Irvine.

(b) That the Master of the Supreme Court might be authorised to pay to the petitioner out of the moneys in his hands to the credit of Harold Irvine such amount as may be necessary to pay the purchase price, transfer duty, and other expenses connected with the purchase.

The petitioner alleged that she had entered into agreements, subject to the Court's sanction, for letting the estate to substantial tenants, until the minor's majority.

A copy of one of the agreements of lease was attached to the petition containing very stringent covenants to be undertaken by the lessees,

and having for their object the general improvement of the estate, and its prevention from deterioration by overstocking, &c.

It was estimated that the rents would yield an annual income after deducting expenses of about £877, or a little over 4 per cent. on the capital invested.

All the heirs interested had given their consent to the sale and purchase, which it was alleged would be to the benefit of the minor.

The matter was referred to the Acting Master, who after stating the facts reported as follows:

1. It is difficult to forecast the inclinations of a boy of not quite ten years of age. With the amount of money which will be at his disposal there are many possibilities within his reach which may not develop a taste for farming.

2. It is proposed to lease the whole of the estate to a number of tenants until the minor becomes of age, that is, for a period of eleven years. With the most stringent conditions the property under a lease is not likely to improve; on the contrary, it is the business of the lessee to take as much out of the land as possible, consequently when the minor attains his majority he will find himself encumbered with a costly but impoverished estate and exhausted lands.

3. This arrangement it is believed would yield an income of over 4 per cent. From an account of estimated receipts and payments supplied the net income expected is £877 per annum. Assuming this estimate to be realised every year the income would just give about 4 per cent.

4. It is not stated how the surplus income is to be disposed of.

5. The money which has been deposited in the Guardians' Fund draws compound interest at 4 per cent., is a better investment and is perfectly safe, and £21,517 10s. if it remained there until the minor attained his majority would amount to £33,125.

6. I do not find anywhere in the will that the father of the minor attached any sentimental value to the property, but of course the petitioners are authorities who claim to be heard on that point (clause 15 of the will).

7. With these few remarks I leave this important matter in your lordships' hands.

Mr. Searle, Q.C., was heard in support of the application.

The application was granted.

The Chief Justice said: The Master has done no more than his duty in pointing out some of the objections to this sale. The most formidable of these objections is, that there may be a danger of the property depreciating in value through being let to different lessees, who would not take proper care of the property, but this difficulty

has been met by the form of lease in which every precaution is taken against any deterioration of the land by improper cultivation on the part of the lessees. In a matter of this kind the real question before the Court is whether it is for the interests of the minor, but at this juncture we must be to a great extent guided by the opinion of those who have the custody of the minor, and by the presumed wishes of his father. It appears that the father of the minor bequeathed the whole of his farm to his then eldest son, who, after his father's death, unfortunately himself died. Well, we may fairly presume that if the son had died before the father the father would have bequeathed this farm to his second son. At the time he bequeathed the farm, the eldest son could hardly have developed such a taste for farming as to occasion the bequeathing of the farm to him on that account. I think, under all the circumstances, that this is a case in which the Court should authorise the sale of the property. It has been valued at £20,792 10s., and all parties are satisfied with this valuation. I do not think there is any necessity for having any further valuation; if any mistake at all has been made in the valuation it would appear to be undervalued rather than overvalued; and in considering the interests of the minor it is not for the Court to raise any objection if there has been an under-valuation of the property. The Court will grant the application as prayed and authorise the Master to pay over to the executor dative such sums as may be necessary for the purpose of effecting the purchase, the purchase price not in any case to exceed £20,792 10s. The costs of the application may come out of the minor's estate.

[Applicant's Attorneys, Messrs. Fairbridge, Arderne & Lawton.]

ZEEMAN'S EXECUTORS V. MASTER } 1895.
OF THE SUPREME COURT. } Dec. 12th.
Will—Mistake in name—Master of Supreme Court.

A will was duly executed and signed by Jacobus Christoffel Zeeman but, by mistake, it purported to be the will of Jacobus Charles Zeeman,
Held, that the mistake did not invalidate the will, and the Master was accordingly authorised to accept it as the will of Jacobus Christoffel Zeeman.

This was an application by Regina F. C. Zeeman and E. J. Moore in their capacity as

executors testamentary of the estate of the late Jacobus Christoffel Zeeman.

The notice of motion called upon the Master to show cause why he should not be ordered to register as the last will and testament of Jacobus Christoffel Zeeman a certain will dated the 6th November, 1895, signed by the late Jacobus Christoffel Zeeman and his wife (the first-named applicant) but wherein he is erroneously described as Jacobus Charles Zeeman, and why he (the respondent) should not be ordered to issue letters of administration to the applicants as executors of the estate of the late Jacobus Christoffel Zeeman by virtue of their appointment under the will.

The facts are briefly these: On the 6th November, 1895, at the request of the first-named applicant and the deceased, who was then lying dangerously ill of dropsy, one C. R. Goodspeed, who had for several years been a great friend of the deceased, went to the office of Mr. W. E. Moore, attorney-at-law, and requested him to prepare a joint will of the first-named applicant and her husband. Goodspeed, in error, gave the name of the deceased as Jacobus Charles Zeeman, and the will was drawn up as that of Jacobus Charles Zeeman and Regina F. C. Zeeman.

The will was then brought to Zeeman and his wife for execution but as the former, was then in a very feeble state it was not deemed advisable to trouble him by reading the full text of the will, but the attorney explained very carefully the provisions of the will to Zeeman, who expressed himself as fully satisfied with it.

The testators then executed the will in the presence of the attorney and his clerk, the two latter signing the will as witnesses. Zeeman signed the will with his ordinary signature J. C. Zeeman, and there was abundant evidence before the Court that the signature was Zeeman's.

Mr. Rose-Innes, Q.C., in support of the application: In this case there is no ambiguity on the face of the will. The language is perfectly clear. It is signed by J. C. Zeeman and if it is his will the Master must recognise it. But he declines, because in the body of the will the testator is described as Jacobus Charles Zeeman. But that description is mere surplusage. The Wills Ordinance does not require the testator's name to be in the body of the will, but merely that he shall sign at the foot or end thereof.

This has been done and there is ample evidence that the person who signed is the testator and that the will expresses his wishes therefore the misdescription is not material.

There is no decision directly in point in our Courts, but see *Ex parte Edmeades* (5 Sheil, 353)

Jarman on Wills (Vol. I., p. 79) and *In the Goods of Thomas Douse* (31 L.J. P. and M. 172).

Mr. Giddy explained the position taken up by the Master.

De Villiers, C.J.: There is no doubt that the document before the Court was executed with all the solemnities required in the execution of a testamentary writing. It was signed by the testator in the presence of the witnesses present at the same time, and it was attested and subscribed by the witnesses in the presence of the testator. The name of the testator was Jacobus Christoffel Zeeman and he signed the will with his ordinary signature J. C. Zeeman, but by mistake the draughtsman had inserted at the commencement of the will the name Jacobus Charles Zeeman as that of the person executing the will. The Master properly refused to accept and file the will as that of Jacobus Christoffel Zeeman without an order of the Court, but the evidence being perfectly satisfactory that he was the person who duly signed the will the Court will now authorise the Master to accept it as the will of Jacobus Christoffel Zeeman.

[Petitioner's Attorney, W. E. Moore.]

THE INCORPORATED LAW SOCIETY { 1895.
V. MCCOLLA. } Dec. 12th.

Attorney—Professional misconduct.

Where an attorney had been entrusted with the collection of certain debts, and had left Cape Town without accounting for the moneys which he had received, the Court granted a rule calling upon him to show cause why he should not be suspended or struck off the rolls.

This was an application by the Law Society for an order declaring that the facts disclosed respecting the respondent in the suit instituted against him by John Scott, jun. (*Supra* p. 352), for the recovery of moneys collected by the said respondent in his capacity as attorney for the said Scott, amount to unprofessional conduct on the part of the said respondent, and that by reason thereof his name be removed from the roll of attorneys of this Court, and for directions as to publication of notice thereof, as his present whereabouts are unknown.

Mr. Searle, Q.C., moved.

The Court granted a rule nisi calling upon the respondent to show cause on the 29th February next why he should not be suspended, or struck off the rolls. Personal service if possible; failing that, publication in a Cape Town English newspaper.

[Attorney, for the Law Society, Messrs. Van Zyl & Buissinné.]

THE COLONIAL GOVERNMENT V. MCCOAY.

Mr. Giddy moved for an order extending the return day of the citation in the suit about to be instituted by edictal citation by applicants against the respondent for the recovery of an amount due on mortgage bond.

Granted.

REGINA V. HUNT AND VAN { 1895.
HOOTEN. } Dec. 12th.

Bail—Reduction—Criminal charge.

Where prisoners had been committed for trial on a charge of theft of jewellery valued at £10, and the Magistrate had fixed their bail at £200 each, the Court refused to reduce the bail, there being no information before Court as to the amount of bail which the prisoners were prepared to find.

This was an application on notice to the Resident Magistrate of Cape Town that he would be required to show cause why the prisoners should not have their bail £200 fixed by him reduced on the ground of the same being excessive, and why such further or other relief should not be granted as to the Court might seem meet, with costs.

The prisoners and one Catherine Dekker were arrested in Cape Town on the 18th November last on a charge of being implicated in the theft of a watch chain and trinket of the value of £10.

A preliminary examination was held, and on the 28th November the prisoners were committed for trial, the Attorney-General having intimated his intention of indicting.

Application was then made to the Magistrate to release the prisoners on bail.

The Magistrate fixed the bail at £200 each, and refused to reduce it.

The prisoners alleged that they had no intention of leaving Cape Town before the trial, and that they considered the bail excessive.

There was evidence before the Court that one of the prisoners had been previously convicted.

Mr. Graham for the applicants.

Mr. Giddy for the Crown.

The application was refused.

The Chief Justice said: The Court would not grant such an order as is now asked for unless we were satisfied that the amount demanded by the Magistrate was excessive. Upon the information before the Court I am not prepared to say that the bail was excessive. A great deal depends on the position in life of the prisoners—and on that we have little information—and on the gravity of the offence. If it be true

that one of these prisoners has been previously convicted, it is a circumstance that might well weigh with the Magistrate in fixing heavy bail. The applicants also do not state what they are prepared to give. If they had said "We can find bail for £100 or £150, but not for £200," the Court might have granted the order, but it is not known to what extent they would be able to find bail. Therefore the Court cannot grant the application, and, besides, the Criminal Sessions will be held in a month.

[Applicants' Attorney, D. Tennant, jun.]

SUPREME COURT.

[Before Sir J. H. DE VILLIERS, K.C.M.G. (Chief Justice), and Mr. Justice BUCHANAN.]

GENERAL MOTIONS.

COLONIAL GOVERNMENT V. CORNE- { 1895.
LIUS F. BOTHA. { Dec. 17th.

Mr. Giddy applied for an order declaring the respondent to be of unsound mind and incapable of administering his own affairs, and appointing a curator of his property and person.

Mr. Smuts appeared as *curator ad litem*.

Dr. Wm. John Dodds, superintendent of the Valkenberg Asylum, said that he had had the man Botha under his charge since 1891. He was first admitted in 1858, and had been in custody ever since. He was of unsound mind and suffered from delusions; for instance, he thought he was the King of France, the real Prince Albert, a very great landed proprietor, and so on. He thought there was little chance of his recovery.

The alleged lunatic, who was present in court, was brought forward and questioned by the Chief Justice. Asked if he was aware that it was proposed to appropriate his money to pay for his keep at Valkenberg, he gave a totally irrelevant and incoherent reply.

Mr. Smuts said that as far as he could ascertain, Botha was utterly unable to conduct his own affairs.

Mr. Giddy said the amount of money due to Botha was £237 19s. 9d.

The Court granted an order declaring the respondent to be a lunatic; appointing Dr. Dodds curator of his person, and Mr. J. A. Reid curator of his property, on the usual terms, with power to pay any arrears due for his maintenance.

T3

THE PETITION OF PIETER W. COETZER.

Mr. Smuts moved for authority to the Master to pay out to petitioner, a minor over twenty years of age, the amount standing to his credit in the Guardians' Fund, to enable him to pay for certain live-stock and farming implements bought by him under a *bona-fide* mistake as to the date of attaining his majority, he being engaged in farming on his own account.

The order was granted.

IN THE ESTATE OF THE LATE KAULELA.

Mr. Giddy applied for an order making absolute the rule *nisi* issued under the Titles Registration and Derelict Lands Act for registration in the name of Sergeant Kaulela, the sole heir in the said estate, of the title to certain piece of land known as garden lot No. 16 in Kaulela's Location, district of Peddie.

The order was granted.

IN THE ESTATE OF THE LATE WILLIAM TITTERTON.

Mr. McGregor moved for authority to the Registrar of Deeds to cancel the transfer, dated 31st December, 1858, made in error to Elizabeth Titterton, wife of the said late William Titterton, since deceased, of certain lot of ground situated in Donkin-street, Port Elizabeth, the same being the property of the said Titterton, but registered by mistake in the name of his wife.

The Court granted a rule calling on all persons concerned to show cause why the order prayed for should not be granted; the rule to be published once in a Port Elizabeth newspaper, returnable on the 13th January.*

IN THE MATTER OF THE MINORS LEIBBRANDT.

Mr. McGregor moved for authority to the mother of the said minors to raise a sum of money on mortgage of certain land and buildings situated in Long and Keerom-streets, Cape Town, for the purpose of effecting necessary repairs, and discharging debts incurred in the maintenance and education of the said minors.

The Court granted an order in the terms of the Master's report.

Ex parte HERTOOG.

Mr. Buchanan moved for the admission of Mr. Charles Hertog as an attorney.

The application was granted, and the oaths duly administered.

* On the return day the rule was made absolute.—R&P.

APPENDIX.

The following circular, which was issued by the Registrar of the Supreme Court on the 19th August, 1895, is published with this number of the Reports for the convenience and information of subscribers who may not have been supplied with copies.

J.D.S.

Office of the Registrar
of the Supreme Court,
Cape Town, 19th August, 1895.

SUPREME COURT PRACTICE.

It is hereby notified for general information, as some misapprehension appears to exist on the subject, that the practice of the Supreme Court, with reference to the disposal of business brought before it, is as follows :

CIVIL TERMS.

For the despatch of the civil business of the Court there are four terms in each year, commencing and ending with each of the following months:—

February, May, August, and November.

Trial cases, including civil appeals, may be set down for hearing on any day during term.

When it shall happen that any of the days appointed for the commencement of term shall be a Sunday or a public holiday, the term shall commence on the Monday or day following; and when any day appointed for the termination of a term shall be a Sunday or a public holiday, the term shall end on the Saturday or day preceding.

DAYS FIXED FOR GENERAL BUSINESS.

The following proceedings, viz. :

Professional applications for admission,
Provisional cases,
Illiquid default cases,
Criminal appeals,
Rehabilitations and releases,
General motions,

are heard on the first and last days of term, and every *Thursday* during term, and on the 12th of every month in vacation. They must be set

down not later than noon on the day previous to their being heard.

VACATION.

The Supreme Court sits in vacation on 12th January, March, April, June, July, September, October, and December.

Should any of these days happen to be a Sunday or a holiday, the sitting will be on the day following.

SITTINGS IN CHAMBERS.

Applications are only heard on *Tuesdays* in Chambers in vacation if they are of a pressing nature.

JUDGE OF THE WEEK.

Applications for provisional orders of sequestration and under the Derelict Lands Act are disposed of by the judge of the week, who also entertains applications for rules nisi, discovery orders, and other incidental matters entered in the Chamber Book. It is sometimes sought to apply, by means of this procedure, to vary or amend an order of Court. This can only be done by the Court itself.

LEAVE TO MARRY.

Where the consent of parents or guardians to the marriage of minors cannot be had, or is refused, the Chief Justice must be approached, under section 17 of the Marriage Order in Council of 7th September, 1838, on petition supported by affidavit for leave to marry, and setting forth the circumstances under which the application is made. When the parents or guardians refuse their consent, the grounds of such refusal must in every case be stated. The parties wishing to marry should be in attendance if possible.

COMMISSIONERS OF THE COURT.

The appointment of Commissioners of the Supreme Court to take affidavits or examine witnesses in any place out of the Colony is made upon application to the Chief Justice on petition, supported by affidavit, and, except in the case of a well-known former inhabitant of this colony, upon the recommendation of some prominent official or legal practitioner of the town in which petitioner resides.

H. TENNANT,
Registrar.

DIGEST OF CASES.

VOL. V.

	PAGE		PAGE
Administration account—Ordinance 104 —Extension—Costs.		degree Cape University—Act 16 of 1873, sections 8 and 20.	
<i>Where an executrix, who had been in possession of an estate for five years without filing a final account, had been summoned by the Master under Ordinance 104, and in answer to the summons alleged inter alia that it was impossible for her to file the account until certain of the heirs had paid in moneys due by them to the estate, the Court, under the special circumstances of the case, granted the executrix an extension of four months within which to file the account, but ordered her to pay the costs of the application.</i>		<i>A graduate of the Cape University and an LL.B., Cambridge, admitted to the same degree Cape University, is entitled to be admitted as an advocate of the Supreme Court, although he has not been called to the English or Irish Bar, and is not an advocate of the Court of Session, Scotland.</i>	
Master v. Louw's Executrix	149	<i>Ex parte Krause</i>	148
Adultery — Divorce — Admission — Evi- dence—Admissibility of record of suit to which defendant was not a party.		2. —Admission.	
<i>B. sued his wife for divorce on the grounds of her adultery with M. B.'s wife in a letter to her husband admitted that she had committed adultery with M. At the trial B.'s counsel asked leave to use as evidence the record in a case, in which M.'s wife sued M. for, and obtained, a decree of divorce on the grounds of his adultery with B.'s wife although the latter was not a party to that suit. Held, that the record was admissible as evidence against B.'s wife.</i>		<i>A barrister who applies to be ad- mitted to practise as an advocate of the Supreme Court should be pre- sent when the application for his admission is made.</i>	
Brookfield v. Brookfield	282	<i>Ex parte Megone</i>	143
Advocate — Admission — Graduate Cape University — LL.B. degree, Cambridge—Admission to the same		Appeal — Privy Council — Charter of Justice, section 50.	
		<i>Leave given to appeal to the Privy Council where the petition had been lodged with the Registrar and notice given to the other side within fourteen days from the date of the judgment, but no application had been made to the Court within the fourteen days.</i>	
		Jones v. Town Council of Cape Town ...	172
		2. —Time—Extension.	
		<i>When an appeal from a Magistrate's judgment has not been prosecuted within the time allowed, good and sufficient cause for the delay must be shown on an application for an ex- tension of time.</i>	
		<i>Where therefore there had been consid- erable delay in prosecuting an appeal, and but little hope of success, the Court refused to grant an extension.</i>	
		Green and Fitzgerald v. Bradford ...	268

	PAGE		PAGE
Appeal to Privy Council — Criminal case—Sections 50 and 51 of Charter of Justice.		terms to submit to arbitration the compensation "for any loss or damage of whatsoever kind caused or to be caused to the applicants by reason of the said expropriation or consequent thereon," and to have the award of the arbitrators made a Rule of Court.	
<i>The Governor having by Proclamation condemned and sentenced a Native Chief under the Pondoland Annexation Act the Court ordered his release on the ground that the Proclamation had not the force of law, whereupon the Attorney-General applied for leave to appeal.</i>		Held that, in the absence of partiality or misconduct, the Government cannot successfully resist an application to have such award made a Rule of Court on the ground that the sum is larger than was contemplated by the Government or Parliament at the time when the expropriation was decided upon, more especially as the applicants had, before such resolution, claimed more than the amount ultimately awarded.	
Held, that the proceeding was not a civil suit in terms of the 50th section of the Charter of Justice and that the Court had no power to grant leave to appeal.		Combrinck & Co. v. Colonial Government 180	
Regina v. Sigcau 290		2. —Building contract—Interdict.	
2. —Security to abide judgment.		<i>A contract for the erection of a building upon the employer's premises having been put an end to by the employer, the contractor insisted upon the right of proceeding with the contract against the will of the employer.</i>	
<i>In an action to recover £5,000 for salvage services, the owners of the salvaged ship tendered £1,000, for which amount judgment was given in favour of the plaintiffs.</i>		Held, that the employer was entitled to an interdict restraining the contractor from coming upon the premises for the purpose.	
<i>The defendants paid the £1,000 less their taxed costs incurred subsequent to the date of tender in terms of the judgment.</i>		Held further, that the right to an interdict was not barred by the fact that the contract provided that the work should be done in a workmanlike manner subject to the condition that should any difficulty arise that cannot be mutually settled, the same be referred to arbitration.	
<i>Subsequently the plaintiffs obtained leave to appeal to the Privy Council, and thereafter they applied to the Court to compel the defendants, who resided out of the jurisdiction, to give security to abide the judgment of the Privy Council.</i>		Power v. Hu-ter 429	
<i>The Court refused the application on the grounds (1) that the presumption was that the amount of the judgment was sufficient, and (2) that even if the amount were increased by the Privy Council the judgment could be enforced in Great Britain.</i>		Articled clerk — Admission—Error in certificates.	
Randall v. Gray.—Re "The Blairhoyle" 465		<i>An articled clerk, who had served the full term of his articles, was admitted to practise as an attorney, where his certificates were made in respect of Bertie Brandon Davis, the appli-</i>	
Arbitration — Award — Rule of Court.			
<i>In consequence of a resolution of Parliament that it was desirable to acquire certain properties, including the applicants' premises for railway purposes, the Government decided to expropriate the applicants' premises and agreed with them in the widest</i>			

	PAGE
cant's real name being Brandon Herbert Davis.	
<i>Ex parte Davis</i>	228
2. —Admission.	
Where an articted clerk had served his articles for the first four and a half months with an attorney, and then acted as a Judge's clerk for twelve months, and served the remaining term of his articles with attorneys.	
Held, that he was entitled to admission.	
<i>Ex parte Hopley</i>	228
3. —Admission—Continuous service.	
Articted clerk, who had been articted for over three years, but who had only served two years and three months continuously under the direct supervision of the attorney to whom he was articted, ordered to serve a further period of nine months.	
<i>Ex parte Vermooten</i>	483
Assumption, substitution, and surrogation — Executors — Letters of administration—Ordinance No. 104.	
The substitution and surrogation of executors have been put an end to by Ordinance No. 104.	
Application to authorise and require the Master of the Supreme Court to issue letters of administration in favour of a surrogated executor refused.	
<i>Ex parte Smith.—Re Titterton's Estate</i>	17
Attachment—Goods—Security for costs.	
<i>Ross v. Farmer</i>	13
2. —Outstanding debts—Unsatisfied judgment.	
<i>Eilenberg v. Jacobson & Company</i> ...	1
3. —Shares.	
Shares ordered to be attached and sold in execution of an unsatisfied judgment of the Supreme Court.	
<i>Scott v. McColla</i>	401
Attorney — Conviction on charge of culpable insolvency—Suspension—Certificates.	

Where an attorney had been convicted of culpable insolvency.

The Court, on the application of the Incorporated Law Society, suspended the attorney from practice until the further order of the Court, and directed that no application should be made for his reinstatement until three years had elapsed from the date of the Court's order.

The Court further directed the attorney to deliver his certificates to the Registrar.

Incorporated Law Society v. Biccard ... 372

2. —Professional misconduct.

Where an attorney had been entrusted with the collection of certain debts, and had left Cape Town without accounting for the moneys which he had received, the Court granted a rule calling upon him to show cause why he should not be suspended or struck off the rolls.

The Incorporated Law Society v. McColla 488

Auditor—Company—Trust deed—Companies Act, 1892—Balance sheet and accounts—Unauthorised speculation—Damages.

The trust deed of a company, not formed under the Companies Act, 1892, provided that the directors shall lay before the shareholders annually a balance sheet "together with any report of the auditors thereon," and that "it shall be the duty of the auditors to examine the books of account and the vouchers belonging thereto, at least once in every six months, and to certify to their finding."

The auditors examined the books and vouchers and certified to their finding, but they never submitted any other report to the shareholders.

Held, in an action by the official liquidator of the company against one of the auditors to recover as damages the loss sustained by the shareholders by reason of the directors' unauthorised speculations during his

	PAGE
<i>term of office, that as he had performed the duty required of him by the trust deed he could not be held liable, as he would have been if the regulations appended to the Companies Act, 1892, had applied.</i>	
Aliwal North Board of Executors, in liquidation v. Greathead ...	451
Bail—Reduction—Criminal charge.	
<i>Where prisoners had been committed for trial on a charge of theft of jewellery valued at £10, and the Magistrate had fixed their bail at £200 each, the Court refused to reduce the bail, there being no information before Court as to the amount of bail which the prisoners were prepared to find.</i>	
Regina v. Hunt and Van Hooten ...	488
Barring appeal—Delay—Reasonable excuse—Magistrate's Court.	
<i>An unsuccessful plaintiff in a Magistrate's Court noted an appeal to the Supreme Court but did not set down the appeal for hearing until eighteen months after judgment.</i>	
<i>Held, that in the absence of any reasonable excuse for the delay the defendant was entitled after due notice to an order barring the appeal.</i>	
Rowell v. De Stadler ...	492
Breach of contract—Onus—Absolution.	
<i>Absolution from the instance granted in an action for damages for breach of contract where the plaintiff had failed to prove that a concluded contract had been entered into between his agent and the defendant.</i>	
Gottlieb v. Grimbeek ...	455
Building contract—Termination—Justification.	
Burns v. Town Council of Cape Town	82
Cession of territory—International law—Private property—Concessions by barbarous potentate—Native customs—Paramount Chief—Treaty of 1814 with Faku—Sir Bartle Frere's Proclamation of 1878—Cession of Pondoland in 1894.	

	PAGE
<i>Before the cession of Eastern Pondoland to the British Crown Sigcau, the Paramount Chief, made certain concessions to the plaintiffs of all the mineral rights in the country, the right to construct a railway, and the right to select a large extent of land as their own property, but, besides searching for graphite in a few spots, the plaintiffs did not act under their concessions, nor did Sigcau grant to them any particular land.</i>	
<i>The native customs did not recognise such concessions, and, even if they did, there was no legal tribunal to enforce rights, but the Chief enjoyed despotic power to grant the rights if he had sufficient power to enforce them.</i>	
<i>After the cession of the territory to the British Crown, and its incorporation with the Cape Colony, the Colonial Government refused to recognise the concessions, whereupon the plaintiffs brought an action to have their rights thereunder declared as against the Government.</i>	
<i>Held, that the Court was not bound by the principles of international law to declare or enforce the alleged rights, which could not, before the cession, have been enforced against the then sovereign.</i>	
<i>In the year 1878 the High Commissioner by proclamation purported to depose Umquikela as Paramount Chief but took no steps to carry the deposition into effect, and continued in several ways to recognise him as Paramount Chief, and after his death, the Government officially addressed Sigcau, his son and successor, by that title.</i>	
<i>The cession of the territory by Sigcau was founded upon his right to make such cession.</i>	
<i>Held, that the Government cannot in this action dispute his title as Paramount Chief.</i>	
Cook Bros. v. Colonial Government ...	107

	PAGE
Child—Criminal responsibility—Obedience to father. <i>A child under fourteen years of age, who assists his father in committing a crime, is presumed to do so in obedience to his father's orders, and is not punishable, even if he knew that he was doing a forbidden act, unless, in the case of a child above seven, the crime was so heinous as obviously to absolve him from the duty of obedience.</i>	
Regina v. Albert	281
Civil imprisonment—Clerk—Magistrate's discretion. <i>Where a Resident Magistrate, in the exercise of his judicial discretion, had refused to grant a decree of civil imprisonment, in respect of an unsatisfied judgment, against a clerk employed in a chemist's shop at a salary barely sufficient to support him,</i> <i>The Court, on appeal, refused to reverse the Magistrate's decision.</i>	
Field & Co v. Wernikoff	26
2.—Insolvency. <i>The Court refused to grant a decree of civil imprisonment against a defendant who had given notice in the "Gazette" of his intention to surrender.</i>	
Mendelssohn v. Judelsohn	256
Commission de bene esse—Evidence. <i>The Court appointed a commission to take the evidence of the defendant and her witnesses, who resided in England, in an action pending in the Supreme Court, where it was not absolutely necessary that such witnesses should be present at the trial.</i>	
Atmore v. Chaddock	466
Commissioner of the Supreme Court—Affidavits—Practice. <i>Affidavits made outside the Colony should be sworn to before a Commissioner of the Supreme Court.</i> <i>If affidavits are sworn to before a Vrederechter (Justice of the</i>	

	PAGE
<i>Peace) in the neighbouring Republics his appointment should be authenticated.</i>	
Midland Agency and Trust Co. v. Burger. <i>Ex parte</i> Burger... ..	261
Commitment to custody—Bail—Warrant <i>A Magistrate, being satisfied from the examination of an insolvent that there was sufficient prima-facie evidence of his having committed culpable insolvency, in the interests of justice and with a view to further proceedings, ordered the insolvent to find bail without having previously issued a warrant for his apprehension. An application by the insolvent to have the proceedings set aside as being illegal was refused with costs, the applicant being in no way prejudiced by the conduct of the Magistrate.</i>	
Nel v. The Resident Magistrate of Worcester	153
Company—Deed of Settlement—Alterations. <i>The Court ratified certain alterations approved of by the shareholders in their deed of settlement and having for their object the enlargement of the company's operations.</i>	
Re Colonial Marine Assurance and Trust Company (Limited)... ..	261
Company in liquidation—Sale of assets—Confirmation. <i>Where the assets of a company in liquidation had been sold in lots, and the debenture-holders had had ample notice of the sale but had made no arrangements to purchase the assets, and the sale had been confirmed by the High Court of Griqualand, the Supreme Court refused on the application of the debenture-holders to interfere with the discretion exercised by the High Court, or to restrain delivery of the assets to the purchasers.</i>	
Re North-eastern Bultfontein (Limited), in Liquidation	

	PAGE		PAGE
Conditions of sale — Water-rate — Liability.		of the Kimberley Town Council, from the Municipal area, it being clear that in neither case was the water acquired by purchase or by virtue of any transaction equivalent to a purchase.	
G., in anticipation of the discovery of gold in the Prince Albert district, laid out a township on his farm and advertised and offered erven for sale. The erven were sold subject to conditions of sale, the 12th condition being in the following terms.		De Beers Consolidated Mines v. Kimberley Waterworks Company ...	100
Water will be laid on to the Market-square for the domestic use of erf-holders on condition of a payment of 5s. per month to the seller, his order, or representative by the owner or occupier of each erf.		Convict—Leave to appeal.	
S. bought three erven and signed the conditions of sale.		Under special circumstances the Court allowed a convict, who was undergoing a term of twelve months' imprisonment for theft, to be heard in appeal from the sentence passed upon him by a Magistrate.	
G. laid on water to the intended site of the Markets-square, but it was not used, as the expectations with regard to the discovery of gold were not realised, and in consequence no buildings were erected on the erven.		Regina v. De Windeck ...	399
Held, on appeal, that S. was liable under the 12th condition of sale to pay the water rate.		Conviction—Sentence—Appeal—Review—Magistrate's Court—Gross irregularity.	
Scott v. Gillet ...	296	A person convicted of an offence in a Magistrate's Court and not sentenced but merely reprimanded, cannot appeal to the Supreme Court, either under the 49th section of Act 20 of 1856 or under the 4th section of Act 21 of 1876	
Construction of agreement—"Obtain and purchase"—Restraint upon exercise of legal rights—Proviso to clause.		If, however, there is no evidence to support the conviction he may apply for a review under the 190th Rule of Court on the ground of gross irregularity in the proceedings.	
By agreement between a Mining Company and a Waterworks Company the former undertook during the term of the agreement to "obtain and purchase" all the water required by them for mining purposes from the latter company and from no other person or company whatsoever; provided that nothing herein contained shall prevent the said Mining Company from using any water obtained by it from the mines or from its wells.		Regina v. Erfuit ...	432
Held, that, the Mining Company were entitled to use for mining purposes water from a mine which they acquired and worked after the date of the agreement and water which they diverted, with the consent		Costs.	
		Where an ex parte application was made for an order compelling the trustee in an insolvent estate to file a contribution account, the matter was ordered to stand over so that notice might be given to the trustee.	
		Afterwards the Court refused the application with costs, as it appeared that the account had been filed the day before the original application was set down for hearing.	
		Jones v. Vickers' Trustee ...	34
		Costs—Security—Domicile—Marriage in community—Funds to defend suit.	
		M. sued his wife, to whom he was married in community, for divorce on the grounds of her adultery,	

	PAGE
<i>In the summons M. was described as being of Johannesburg, in the South African Republic.</i>	
<i>The Court, on being satisfied that M. had not left the Colony with the intention of acquiring a new domicile, refused to order him to find security for costs.</i>	
<i>On the application of M.'s wife the Court ordered him to contribute £15 to help in defraying his wife's costs, she having, as she alleged, a good defence to the action.</i>	
Michiel v. Michiel	427
3.—Summons—Withdrawal.	
<i>An informal summons in a Magistrate's Court having been issued, the case was withdrawn on the day of hearing, but no application was made on behalf of the defendant for his costs, and on the same day a fresh summons was issued.</i>	
<i>On the day of hearing the second summons the defendant objected to the proceedings as his costs in the previous case had not been paid.</i>	
<i>The Court, on appeal, reversed the Magistrate's decision upholding the objections.</i>	
<i>The case of Simpson & Co. v. Fleck (2 Menz. 255) commented upon and distinguished.</i>	
Mariacowitz v. Matthys	229
Costs of appearance—Marriage in community—Separation—Mortgage by wife.	
<i>Where a woman married in community of property, and separated from her husband under a notarial deed, sought to mortgage property, which had been acquired by her subsequent to the date of separation, without the assistance of her husband, and the latter appeared for the purpose of having a clause inserted in the bond freeing him from liability, the Court allowed him his costs of appearance.</i>	
Hartmann v. Hartmann... ..	484

	PAGE
Crown lands—Recovery of rent—Ordinance 9 of 1844—Civil Commissioner's writ.	
<i>Where there had been a return of nulla bona to a writ issued, in respect of rent overdue, by a Civil Commissioner under Ordinance 9 of 1844 and provisional sentence was afterwards prayed for the amount of the rent,</i>	
<i>The Court treated the matter as an illiquid case, granted judgment, and declared the property executable.</i>	
Colonial Government v Silo	209
Culpable insolvency—Punishment.	
<i>A punishment of six months' imprisonment with hard labour may be passed in respect of each of the offences enumerated in the 71st section of the Insolvent Ordinance.</i>	
Regina v Keyter	160
Curator bonis—Release from office.	
<i>Curator bonis of a lunatic relieved from his curatorship on the grounds of his advanced years, bodily ailments, and consequent inability to attend to the affairs of the estate.</i>	
Ex parte Bertram	368
Deaf mute—Curator bonis—Rule nisi.	
<i>Where there was prima facie evidence that a deaf mute was incapable of managing her affairs, the Court appointed a curator ad litem to assist her, and granted a rule nisi calling upon her to show cause why a curator bonis should not be appointed to manage her property.</i>	
Re Spolander	254
Declaration of rights—Farm—Dispute as to boundaries.	
De Klerk v. Le Roux and Samaai ...	439
Derelict Lands Act, 1881—Farm—Transfer—Griqua law.	
<i>Transfer of a farm ordered to be passed to the executor of the purchaser, who had acquired the farm twenty years prior to the date of the application, no objection during this period having been raised by the</i>	

	PAGE		PAGE
<i>Vendor's widow although she now opposed the application on the grounds, (1) that the full purchase price had not been paid, and (2) that by Griqualand law her husband could not sell the farm without her consent.</i>		<i>Company v Official Liquidator North-Eastern Bultfontein and the Registrar of Deeds, Griqualand West</i>	235
Strachan's Executor v. Vries	381	Diamond mines—Maintenance of order and good government—Leases—Rent—Contribution payable	
2.—Erven—Registration—Notice— <i>Ex parte Jansenville Municipality</i>	8	<i>Held, that the defendant company was not liable to pay a contribution to Government for the maintenance of order and good government in respect of claims leased from which no rent had been received by the company.</i>	
Diamond mine—Claimholders—Lessor and lessee—Insolvency—Tacit hypothecation of lessor—Winding up—Griqualand West Ordinance, No 16 of 1880, sections 6 and 7—Act 19 of 1883, sections 25 and 70—Transfer of claims—Construction of Statutes.		Colonial Government v. London and South African Exploration Co., Ltd.	194
<i>The official liquidator of a Company, which at the date of the winding-up order was a lessee of claims in the Bultfontein Diamond Mine, is entitled to an order compelling the lessor to allow transfer and registration of such claims, although all the rents payable in respect of such claims have not yet been paid to the lessor. Different provisions in a Statute should, if possible, be so construed as to be consistent with each other, and therefore the privilege conferred upon certain classes of creditors of claimholders by the 25th Section of Act 19 of 1883 must be confined to cases to which the 70th Section does not apply. The priority which lessors enjoy under the 70th Section exists independently of the tacit hypothecation for one year's rent which as such lessors they are entitled to on the lessee's goods and chattels brought on the land.</i>		Discovery—332nd Rule of Court.	
<i>The deed of lease authorised the lessee to transfer the claims during the term on condition that no such transfer should be made unless all rents should have been paid.</i>		Van Noorden v. Van Zyl	100
<i>Held, that this condition applied only to voluntary transfers.</i>		Divisional Councils Act, 1889, sections 4, 30 and 82—"Contractor"—Lessee.	
London and South African Exploration		<i>Held, that a lessee of premises vested in a Divisional Council is not a contractor within the meaning of section 4 of the Act, and is not incapacitated by section 82 from holding office as a member of the Council.</i>	
		Searle v. Parsons and the Chairman of the George Divisional Council ...	374
		Divorce—Pauper suit.	
		<i>The Court refused to allow a petitioner to sue his wife in forma pauperis in an action for divorce, where the respondent was alleged to have deserted the petitioner forty-five years previous to the date of the application.</i>	
		Scheepers v. Scheepers	259
		2.—Pauper suit.	
		<i>Unless there are some very special circumstances the Court will not in future refer petitions for leave to sue in forma pauperis in actions for divorce to counsel.</i>	
		Murphy v. Murphy	260
		Donation—Registration—Minor child—Acceptance by father—Revocation—Majority—Ratification.	
		<i>Donations proper, as distinguished</i>	

PAGE

PAGE

from remuneratory donations, require registration in the Deeds Office if they exceed the sum of £500 in value, and they are invalid and revocable to the extent of such excess, unless so registered.

A donation by a father to his minor child is completed by such registration whatever the amount may be.

An unregistered donation by a father to his minor child is not deemed to be complete without clear proof of acceptance by the child or by the father on behalf of the child.

Acceptance by the child alone is sufficient if he has reached the age of puberty, but if he is under that age, the gift must be accepted by the Court, the Master, or the father on his behalf.

Whether the minor be under or above the age of puberty the complete acceptance by the father would be sufficient, but such acceptance would be incomplete, as such, without some act done by the father to prove his intention to divest himself of the property, such as delivery to a third person, transfer in the Deeds Office, or, in the case of a cession of action, notice to the debtor of such cession to the child.

The plaintiff's father deposited the sum of £334 in her name in the Savings Bank at a time when she was still under twelve years of age and the Bank credited her with the amount.

Held that, as the Bank was authorised by law to receive deposits from parents on behalf of their minor children, the deposit by the plaintiff's father coupled with the receipt of the money by the Bank to her credit constituted a sufficient acceptance of the donation by the plaintiff's father on her behalf.

Before the plaintiff attained majority her father with her concurrence withdrew the money and dealt with it

as his own, and after attaining majority the plaintiff and her husband for several years lived rent free in a house belonging to plaintiff's father, and received other benefits from him.

She became insolvent but did not claim the money, although if she had received the amount her estate would have been perfectly solvent.

No action was brought against the father during his lifetime, but after his death the present action was brought against his executor.

Held, that although the plaintiff's assent to the withdrawal did not prejudice her rights, her subsequent conduct amounted to a ratification of her father's revocation of his gift.

Slabber v. Neezer's Executors ... 189

Double costs—Notice—Insolvent Ordinance, section 82.

Double costs refused against a debtor at the suit of the trustee of an insolvent estate in the absence of any prayer for such costs either in the summons or in the declaration.

Biccard's Trustees v. Visagie ... 416

Ejectment—Quitrent title—Trust.

In 1887 the Colonial Government granted under Act 14 of 1878, section 11, a quitrent farm, situated in Emigrant Tembuland, to Bishop J. and his successors in office, in trust, but the objects of the trust were not specified in the grant.

Thereafter in June, 1894, Bishop J. sold the farm to S.

On taking possession of the farm S. found the defendant and a number of other Tembus in occupation of the farm, they having been located there by a Magistrate after the Tembu rebellion, and on their refusal to give up possession, or pay rent in respect of their occupation, he sued the defendant in the Magistrate's Court of the district for ejectment and damages.

	PAGE		PAGE
<i>The Magistrate gave judgment for the defendant on the grounds that the farm was granted to Bishop J. in trust for the benefit of the defendant and the Tembus generally; that, notwithstanding the sale of the farm to S., the defendant's rights remained unaltered, and that if S. had any remedy it was against Bishop J. Held, on appeal, reversing the Magistrate's decision, that S. was entitled to a decree of ejectment.</i>		<i>when distributing the proceeds of the sale, in paying the interest, to the extent to which it is preferent, before paying any part of the capital. The right of a debtor to appropriate does not apply to any debt which he proposed to pay in part but which the creditor is entitled, under the instrument of debt, to receive only in full.</i>	
Schultz v. Stafanis	424	<i>The rule that failing appropriation by the debtor and creditor the law will appropriate to the debt which is most onerous for the debtor applies only as between principal debts and not as between a capital sum and interest thereon.</i>	
Election of Municipal Commissioners—Resident Magistrate—Mandamus—Act 45 of 1882, section 40—Act 5 of 1895—Act 14 of 1859.		Brink, N.O. v. the High Sheriff and Fletcher's Executors	420
<i>The Court refused to grant a mandamus compelling the Resident Magistrate of Cape Town to fix a day, under Act 45 of 1882, section 40, for the election of Councillors for the Municipality of Sea Point, the time having elapsed within which the election should have taken place.</i>		Executor and trustee—Removal.	
Commissioners Green Point and Sea Point Municipality v. The Colonial Secretary and Resident Magistrate, Cape Town	445	<i>Where an executor testamentary and trustee applied to be relieved of his duties and trusts, on the grounds that owing to ill-health his medical advisers had recommended him to visit Europe, the Court relieved him from his office of trustee.</i>	
Execution — Sheriff — Preference — Mortgage bond—Interest—Capital—Appropriation of payments—Costs of obtaining judgment—Confirmation of account—Res judicata.		<i>Ex parte Michell. Re Blyth's Will ...</i>	157
<i>In the distribution of the proceeds of the sale in execution of land specially mortgaged, the mortgagee is entitled to preference for the interest stipulated in the bond for a year and the current year preceding the issue of the writ of execution, and for the further period from the date of such issue to the time of payment.</i>		Executor Testamentary—Error in name.	
<i>He is also entitled to preference for the costs incurred by him in rendering the property executable, including his necessary costs in obtaining judgment on his bond.</i>		<i>Where a testator had, by his last will, appointed John Mason Edmeades of Oudtshoorn his executor, and there was no person of that name in the district, but there was evidence to show that the testator intended to appoint his friend, John Robert Bazett Edmeades, his executor, the Court granted a rule calling upon all persons concerned to show cause why letters of administration should not be granted to J. R. B. Edmeades.</i>	
<i>Where interest as well as capital is payable the Sheriff is justified,</i>		<i>Ex parte Edmeades. Re Jeffrey's Will</i>	353
		2. —Resignation — Appointment of trustee.	
		<i>The Court in relieving an executor testamentary of his trust, owing to his advancing years and infirmity, appointed a trustee in his place to assist in administering the estate.</i>	
		<i>Ex parte Guest. Re Pawle's Will ...</i>	464

Executors Testamentary—Release from office.

Where the petitioners had been appointed executors testamentary, but not administrators, and had no power of assumption under the will, and the administration of the estate was likely to extend over a considerable period, the Court at their request accepted their resignation and appointed a Trust Company in their place.

Ex parte Schreiner and Silke Re Reitz's Will ... 367

2.—Application for removal.

Where sufficient cause had not been shown for removing executors testamentary from their trust the Court granted a rule nisi calling upon them to show cause why the estate should not be realised and accounts filed within three months from the date of the order.

Birt and Close v. Jones's Executors ... 253

False imprisonment—Malicious prosecution—Arrest—Summons—Warrant—Summary jurisdiction.

The plaintiff, having been assaulted by the defendant, threatened to assault the defendant whenever he found him, whereupon the defendant caused the plaintiff to be arrested, handcuffed, and imprisoned by two policemen, but laid no criminal charge against the plaintiff.

In an action for false imprisonment and for malicious prosecution the Magistrate granted absolution from the instance.

Held, on appeal, that inasmuch as the plaintiff's offence, if any, fell within the Magistrate's summary jurisdiction, the plaintiff ought to have been summoned under the 68th Rule of the Magistrates' Courts, and not arrested at the instance of the defendant, without a warrant, and that upon the evidence the defen-

dant was liable in damages for false imprisonment

Rademeyer v. Van der Merwe ... 475

Farm—Action to compel transfer—

Costs—Myburgh v. Green ... 277

General average—Bill of lading—York and Antwerp Rules—Sale of cargo—Interdict.

Interdict granted to restrain the master of a ship from selling part of the cargo for the purpose of paying expenses of repairs in a port not being a port of refuge; there being no prima-facie ground for holding that the damage to the ship, which was occasioned by the leakage of sulphuric acid improperly conveyed, to the knowledge of the master, in iron drums, constituted a loss for which contribution must be made by the owners of the rest of the cargo who, under their bills of lading, had agreed to be bound by the York and Antwerp Rules of 1890.

In re "Ernestine" ... 53

Guarantee—Action on.

Markham v. Frames ... 76

Habitual Drunkard—Liquor Act (1891), section 28 — Police Offences Act (1882), section 9.

Where a prisoner, who was charged before a Magistrate and found guilty of contravening section 9 of the Police Offences Act of 1882, had been during the twelve months preceding the date of his conviction three times convicted of drunkenness and once, within the same period, of contravening section 10 of the Police Offences Act of 1882, and was sentenced by the Magistrate to twelve months' imprisonment with hard labour under Act 25 of 1891, section 28,

The Court, on review, quashed the conviction.

Queen v. Allies ... 185

	PAGE
Husband and wife — Edictal citation —Restitution of conjugal rights— Domicile—Jurisdiction. <i>Application by a wife to sue her husband by edictal citation for restitution of conjugal rights refused on the ground that neither the husband nor the wife had ever been domiciled here and the marriage had been contracted elsewhere.</i>	
Whipp v. Whipp	225
2. —Interdict. <i>A wife, married out of community of property, advanced her money to her husband to enable him to purchase certain land but obtained no security for the loan.</i> <i>Thereafter she instituted an action against him for divorce on the ground of incest and for a refund of the money, and, having ascertained that he was about to alienate the property, she applied for an interdict to restrain him from alienating or mortgaging the land pending such action.</i> <i>Held, that the husband's marital power did not debar the wife from the relief sought, and that, as no creditors would be injured thereby, she was entitled to a temporary interdict.</i>	
Liebetrau v. Liebetrau	284
3. —Separation a mensa et thoro— Divorce—Ante-nuptial contract— Douaire—Mutual promises—Forfeiture of benefits. <i>Misconduct on the part of one spouse, which is sufficient to justify a decree of judicial separation, entitles the injured spouse to an order rescinding any ante-nuptial promise which he or she may have made of a gift to take effect on his or her death, but, on the other hand, where mutual promises of this nature have been made by both spouses, the injured spouse, who elects to have his or her promise rescinded, can only obtain</i>	

	PAGE
<i>the order subject to a renunciation of the promise made in his or her favour.</i> <i>Benefits which have already accrued are not liable to forfeiture upon a decree for separation a mensa et thoro.</i>	
Wessels v. Wessels	442
Insolvency—Proof of debt—Withdrawal without order of Court—Costs. <i>A creditor, who has proved a claim in an insolvent estate, may withdraw the claim without an order of Court, but he remains liable for his share of costs incurred bona fide by the trustee prior to the date of withdrawal.</i>	
Cressey and Others v. Haarhoff's Trustee	157
2. —Alleged sale—Pledge—Vesting. <i>Where certain movables, which were alleged to have been sold, but were really only pledged, by the insolvents in whose possession they remained, and which the Court found had never vested in the pledgee, were taken possession of by the pledgee after the insolvents had filed their schedules, Held, that the trustee was entitled to the value of the articles.</i>	
Heyneman's Trustee v. Loubser ...	185
3. —Election of trustee—Confirmation. <i>At a special meeting of creditors held before a Magistrate for the election of a trustee two creditors, each of whose claim was below £30, voted for O.</i> <i>One creditor, whose claim was below £30, voted for F.</i> <i>The Magistrate declared O. elected sole trustee, and the Court confirmed the appointment.</i>	
Re Du Toit's Estate	188
4. —Undue preference—General bond—Contemplation of sequestration—Onus. <i>Z., four months before his estate was sequestrated, and at a time when</i>	

	PAGE
his assets exceeded his liabilities, passed a general bond in favour of L. & Co.	
In an action for undue preference instituted in the High Court of Griqualand West by Z.'s trustees against L. & Co., judgment was given in favour of the defendants, the Court, by a majority, holding that when Z., passed the bond he did not contemplate the sequestration of his estate.	
On appeal, the judgment of the Court below was sustained.	
Ziegler's Trustees v. Liebermann, Bellstedt & Co.	230
5.—Release—Notice—Practice.	
At the first and second meetings in an insolvent estate no creditors appeared and no trustee was elected.	
Thereafter the insolvent applied for the release of his estate from sequestration.	
The Court refused the application on the grounds that notice had not been published in the "Gazette" nor had an affidavit of full and fair surrender been filed.	
Ex parte Van Broembseu	257
6.—Liquidation—Liabilities.	
Where the liabilities of a partnership were not in respect of the general body of creditors but were represented by losses on the partners' capital and an agreement had been come to amongst the members of the partnership to liquidate their business, and it was anticipated that there would be a substantial balance after all creditors had been paid in full,	
The Court discharged a provisional order of sequestration obtained on the petition of a creditor, the wife of one of the partners.	
Van der Walt v. Kruger, Pelser & Co.	263
7. —Rehabilitation.	
The Court granted the rehabilitation of an insolvent the account in whose estate had not been confirmed owing	

	PAGE
to the negligence of the trustee, who had died previous to the date of the application.	
Ex parte Dreyer	483
Insolvent Ordinance—Section 106—Discharge—Composition—Liability on preferent claims continued.	
The Court, under the 106th section of the Ordinance, granted the discharge of certain insolvents who had entered into a composition with their creditors in terms of which they were to remain liable on the preferent claims against their estates.	
Ex parte Rossouw. Ex parte Kay ...	211
Interdict—Trespass.	
Interdict granted, pending the institution of an action, restraining the making of bricks and other similar acts of trespass on the remaining extent of the farms "Hartebeest River" and "Grobbelaar's River," commonly called the Commonage of Oudtshoorn.	
Lind v. Gibbs & Cooper	292
2.—Trespass—Agent verbally appointed.	
The Court, on the application of an agent verbally appointed by his principal, who was in England at the date of the application, granted an interdict restraining trespass and other injuries to land.	
Brewis v. Scott	360
3 —Watercourse—Remedy by action.	
The Court refused to grant an interdict restraining the respondents from constructing a dam and watercourse, leaving the applicants to their remedy by action.	
Oppel and Others v. Le Roux and Others	151
Interpleader suit — Pledge — Goods attached declared executable.	
Where goods, which had been attached by a judgment creditor, were alleged to have been sold to one De J. by the judgment debtor, although in terms of the alleged contract of sale,	

	PAGE		PAGE
<i>they were to remain in the possession of the judgment debtor, and were actually in his possession when they were attached</i>		<i>—Attachment—Reasonable ground for belief of tenant's intention to remove goods.</i>	
<i>The Court, reversing a Magistrate's decision, held that the transaction between the judgment debtor and De J. was not a bona-fide sale, that it was a mere pledge, and that as the goods remained in the possession of the judgment debtor, they were liable to execution.</i>		<i>A lessor, who reasonably apprehends that the lessee will remove movables from the premises leased, is entitled to an order for the attachment of such movables pending an action to recover the rent due.</i>	
Friberg v. De Jager	161	<i>Such apprehension is not unreasonable where the rent is long overdue after several applications for payment, and the lessor has reason to know that the lessee had left premises previously hired by him from another person without payment of the rent due.</i>	
2. —Further evidence—Appeal.		Greff v. Pretorius	182
<i>Case remitted for further evidence as to ownership of property declared executable in an interpleader suit.</i>		2.—Tacit hypothecation—Movables of a third person	
Koch v. Zackon	223	<i>The owner of furniture let it to the lessee of certain premises, who afterwards removed it to other premises without the knowledge or consent of such owner.</i>	
Jurisdiction—Resident Magistrate—Lease—Cancellation of lease—Bona-fide defence Eviction—Measure of damages.		<i>Held that, although the lessor of the new premises had no notice that the furniture did not belong to the lessee, he had no tacit hypothecation over the furniture.</i>	
<i>In a claim for £20 damages in a Magistrate's Court for wrongful eviction the defendant, without excepting to the jurisdiction, pleaded that the written lease had been cancelled by an oral agreement.</i>		Heugh's Trustee v. Heydendrych ...	327
<i>The Magistrate having sustained the plea,</i>		3.—Nuisance—Authority—Barring appeal—Reasonable time—Notice.	
<i>Held, on appeal, that, as the evidence did not support the plea but on the contrary satisfied the Court that the defence was not a bona-fide one, the objection now taken to the jurisdiction could not be sustained, and that the plaintiff was entitled to damages.</i>		<i>A lessor is not liable at the suit of a third party for a nuisance committed upon the leased premises without proof of authority, express or implied, having been given to the lessee to do the acts complained of.</i>	
<i>A lessee, who has been wrongfully evicted, may elect to sue the lessor for damages sustained, or to be sustained, during the full stipulated term, but if in such action he offers no proof of loss beyond the fact that he earned a certain profit while in possession of the leased premises and has not earned any since prospective damages should not be awarded.</i>		<i>An application to bar an appeal on the ground of unreasonable delay can only be made after due notice in writing to the appellant, in order to give him an opportunity of explaining the cause of the delay.</i>	
Dias v. Laurence	409	Harris v. De Waal	414
Lessor and lessee—Rent—Tacit hypothec		Liberty of the subject—Habeas Corpus—Trial and sentence by Proclamation—Pondoland Annexation Act, 1894,	

PAGE

PAGE

The Act for the annexation of Pondoland enacts that the said Territory shall be subject to such laws as have already been proclaimed, and such as, after annexation, the Governor shall from time to time by Proclamation declare to be in force in such Territory.

Among the laws so introduced was the Native Territories Penal Code.

Thereafter the Governor issued a Proclamation declaring that the Chief Sigcau "had by his acts, in disregard and defiance of the law, rendered himself liable to arrest," and authorising the Chief Magistrate to arrest and detain him in such safe place as may be by the Governor from time to time determined.

Held, on an application by Sigcau for his release from imprisonment, that the Act did not authorise the issue of a Proclamation for the arrest, condemnation and imprisonment of any individual, without the intervention of any judicial tribunal, and that the applicant was entitled to be released.

Sigcau v. The Queen ... 268

Liquor—Sale without licence—No evidence of sale—Conviction quashed.

V. was convicted by a Magistrate of contravening Act 28 of 1883, section 73, by selling liquor to one R. and others without having the licence required by law.

There was no evidence whatever of the sale of the liquor; but V.'s wife admitted that she had given some sherry, which had been left at the house by a visitor some few days before, to two of the men..

On appeal the conviction was quashed.

Regina v. Vedders ... 159

Liquor licence Act 28 of 1883, section 89—No proof of prohibition.

W. was charged with and convicted of contravening Act 28 of 1883, section 89, in that he sold liquor to

one H, to whom the sale of liquor had been forbidden for a period of twelve months under the 89th section.

No proof was produced at the trial that H. had been forbidden liquor, nor was there any evidence to show that W. had any knowledge of the prohibition.

On appeal the conviction was quashed.

Regina v. Williams ... 20

2.—Act 28 of 1883, section 75—Credibility of witnesses.

Where in a prosecution for contravening the Liquor Licensing Act of 1883 the Magistrate believed the evidence for the prosecution and convicted, the Court, on appeal, declined to interfere with the sentence passed by the Magistrate.

Regina v. Bredenkamp ... 389

3.—Act 28 of 1883, section 75—Contravention—Sale without licence.

Regina v. Wessels ... 7

Liquor Licensing Acts—Local option—Memorials — Reasonable time — Cancellation of licence.

A memorial approving of the issue of a new licence was signed, amongst others, by five voters, who placed their marks on the same, but the person attesting the marks was not a registered elector for the Divisional Council.

Held that, for the purpose of ascertaining whether the memorial was duly signed by a majority of voters within the ward, in terms of the 13th section of Act 25 of 1891, the names of the five voters must be excluded.

A memorial objecting to the issue of a new licence must be lodged with the Resident Magistrate at a reasonable time before the meeting of the Licensing Court so as to give the applicant for the licence an opportunity of meeting the objections, but the provision as to the lodging of memorials four days before the meeting of the Court does not apply to such a memorial,

	PAGE
<i>A memorial objecting to the issue of a new licence to the respondent was lodged by the applicant within the four days by about an hour, but the person who collected the signatures did not append a certificate in terms of the 24th section of the Act 28 of 1883 until the morning the Court sat. Held that, in the absence of any proof of prejudice to the respondent, the Court was not justified in rejecting the memorial on the ground either that it was not lodged in time or that the certificate was improperly appended.</i>	
<i>Upon the memorial objecting to the licence appeared the names of several persons who had signed the memorial approving of the licence.</i>	
<i>Held that, the names must be excluded from both memorials.</i>	
<i>After excluding those names as well as the names of those whose marks had not been properly certified there was not a majority in favour of the licence.</i>	
<i>Held, that the Licensing Court was not justified in issuing a new licence, and, ordered that the same be cancelled.</i>	
Raubenheimer v. Parsons and The George Licensing Court	383
Lunatic—Summons—Cost of maintenance—Magistrate's duty in granting a reception order under Act 35 of 1891.	
<i>Where proceedings are taken against an alleged lunatic under detention to have him declared of unsound mind the summons should contain a specific allegation as to the previous judicial order under which he is detained. The Court, on being satisfied that a lunatic had property, ordered his curator bonis to contribute a certain sum per month out of the lunatic's funds towards his maintenance while under detention in a Government lunatic asylum.</i>	

	PAGE
<i>Before a Magistrate grants a detention order under Act 35 of 1891 he should inquire into the means of the alleged lunatic for the information of the Court or Judge before whom proceedings are subsequently taken.</i>	
Whelan v. White	226
Magistrate—Jurisdiction— <i>Res judicata</i> —Maintenance.	
<i>The plaintiff, who had obtained judgment in a Magistrate's Court for £12 for the maintenance of an illegitimate child until the date of summons, afterwards brought an action in the same Court for £20 for maintenance subsequent to that date, but, on exception taken, the Magistrate decided that he had no jurisdiction.</i>	
<i>Held, that as the two actions were separate and distinct, the Magistrate had jurisdiction in the second action to decide upon a claim for maintenance not included in the first.</i>	
Jordaan v. Peters (Buch. 1879, p. 203) distinguished.	
Fredericks v. Jaffar	394
Magistrate's Court—Rehearing of case.	
<i>In an application on behalf of the plaintiff, against whom judgment had been given by a Resident Magistrate's Court, for an order to compel the Magistrate to re-open the case on the ground that he had refused to hear certain witnesses produced on behalf of the plaintiff,</i>	
<i>Held, that the plaintiff ought to have tendered his witnesses for examination in the Court below, and requested the Magistrate to make a note of such tender, and that in the absence of clear proof of the Magistrate's refusal to take their evidence the application ought not to be granted.</i>	
Koch v. Zackon and the R.M. of Van Rbyn's Doip	155
2. —Magistrate's Court—Jurisdiction—Eviction—Ejectment—Lease— <i>Bona-fide</i> defence,	

PAGE

PAGE

The lessee of a windmill sued the lessor in a Magistrate's Court for specific performance and for £10 as damages for wrongful eviction and the defendant took exception to the jurisdiction, but judgment was given for the plaintiff on both counts.

Held, on appeal, that the Magistrate had no jurisdiction to decree specific performance on the first count, and that, as the plaintiff did not offer to amend the summons in the Court below by striking out the first count, the whole summons was beyond his jurisdiction.

Held, further, that the 10th section of Act 20 of 1856 does not confer jurisdiction on magistrates in actions for ejectment against a lessor at the suit of the lessee.

Le Croes v. Goldie ... 392

3. — Summons—Exception—Damages.

Where, in a summons in a Magistrate's Court for damages for the wrongful taking and selling of the plaintiff's goods, it sufficiently appears that the amount claimed is intended to represent the value of the goods, it is no ground of exception that the summons ought to have claimed delivery of the goods with an alternative claim for damages.

Van der Westhuizen v. Cohen Brothers 56

Magistrate's jurisdiction — Set-off or compensation—Counter-claim—Exception.

In an action in a Magistrate's Court for £18, being for cash advanced, the defendant excepted to the jurisdiction on the ground that he had a counter-claim for £23, but admitted that he owed the £18 to the plaintiff.

Held, that the defendant's claim was reduced by his admission to £5 and that, as this amount was within the Magistrate's jurisdiction, he ought not to have allowed the exception.

Kerdel v. Bam ... 25

2. — Act 20 of 1856, section 10 — Ejectment — Agricultural Lands Act, 1882—Sub-lease.

J., the wife of a licensee under Act 37 of 1882, acting under a power of attorney from her husband, sub-let the land leased to H., but before the expiration of the sub-lease she entered upon the property and resumed possession.

H. sued J. in the Magistrate's Court for ejectment, and judgment was given in favour of J.

Held, on appeal, without deciding as to the validity of the sub-lease entered into between J. and H., that the Magistrate would have been justified, owing to want of jurisdiction, in granting absolution from the instance on the claim for ejectment.

Hearns v. Jackson ... 137

3. — Construction of Statute—Forum of defendant—"Residing."

In construing the words of a Statute it must be assumed that the Legislature used them in their popular sense unless they have acquired a different technical meaning in legal nomenclature, or unless the context or the subject matter clearly shows that they were intended to be used in a different sense.

Under the Magistrate's Court Act any Resident Magistrate has jurisdiction in all civil cases brought against any person "residing" within the district of such Magistrate.

Held, that the Resident Magistrate of the district in which the defendant carried on his business as a merchant properly sustained the objection to his jurisdiction on proof that the defendant's place of abode was in another district.

Beedle & Co., limited, in liquidation v. Bowley ... 412

4. — Act 20 of 1856, Schedule B, Rules 8, 9, and 29—Re-opening case—Summons—Service.

	PAGE		PAGE
H. & Co., resident in the district of Cape Town, sued M. in the Resident Magistrate's Court, Wynberg, obtained provisional judgment against him, and issued a writ of execution.		trate to re-open a case tried before him and to admit further evidence where such evidence had not been formally tendered at the trial.	
Thereafter M. issued a summons out of the Wynberg Court under Act 20 of 1856, Schedule B, Rule 29, calling upon H. & Co. to show cause why the case should not be re-opened.		Hauman v. McFarlane and Resident Magistrate of Caledon ... 467	
The summons was served at H. & Co.'s place of business in Cape Town by the deputy messenger of the Cape Town Court.		Marital power—Non-exclusion in ante-nuptial contract—Property registered in wife's name—Leave to transfer without husband's authority—Rule nisi.	
At the hearing H. & Co. excepted to the summons on the grounds (1) that it had not been legally served upon them by the messenger of the Wynberg Court, and (2) that they did not reside within the jurisdiction of the Wynberg Court.		Where a woman married by ante-nuptial contract, the marital power not being excluded, sought to transfer property registered in her name without the assistance of her husband, whose whereabouts were unknown, the Court granted a rule calling upon the husband to show cause why his wife should not be allowed to pass transfer.	
The Magistrate sustained both the exceptions, and dismissed the summons with costs.		Ex parte Trower... 36	
Held, on appeal, reversing the Magistrate's decision, (1) that the service was good, and (2) that as H. & Co. had selected the Wynberg Court as their forum in the first case they could not in the second case object to the Magistrate's jurisdiction.		2. — Non-exclusion in ante-nuptial contract—Mortgage bond.	
Mardt v. Hickson, Son & Co. ... 474		The Court granted leave to the petitioner, who was married to her husband by ante-nuptial contract, the marital power not being excluded, to pass a mortgage bond, without the assistance of her husband, whose whereabouts were unknown, for the balance of the purchase price of certain property which she had bought.	
4. — Theft—Conviction on separate indictments.		Ex parte Minto ... 99	
Where a prisoner was charged on two indictments with the theft of different articles, found guilty, and sentenced to separate terms of imprisonment on each indictment, The Court, on review, quashed the conviction on the second indictment.		Married woman — Marital power — Transfer of land.	
Regina v. Blauwveroi ... 53		The Court authorised a woman married by contract, the marital power not being excluded, to pass transfer of land registered in her name to a purchaser, her husband's whereabouts being unknown.	
Mandamus — Resident Magistrate — Refusal to admit further evidence — Formal tender.		ex parte Minto ... 417	
The Court refused to grant a mandamus compelling a Resident Magis-		Master and servant—Act 18 of 1873, section 2, sub-section (8).	
		Conviction for a contravention of Act 18 of 1873, section 2, sub-section (8), quashed, where the language	

	PAGE
<i>complained of had not been set forth in the summons and the case had been tried and the sentence passed by the prisoner's master, a S J.P.</i>	
<i>Regina v. Piet Plaatjes</i>	372
Master of Supreme Court—Meetings of creditors—Section 25 of Insolvent Ordinance.	
<i>Where creditors fail to appear at the first or second meeting of creditors called under the 25th section of the Insolvent Ordinance, the Master may call a fresh meeting without the special authority of the Supreme Court.</i>	
<i>In re Coetzee's Insolvent Estate</i> ...	428
Mines and Minerals—Diamondiferous ground —Inspection—Prima-facie evidence of the existence of diamonds.	
<i>Where the applicants had leased certain ground to the respondents, and under the lease they were entitled to a surrender on the discovery of diamonds in the ground leased, the Court on being satisfied that there was prima-facie evidence of the existence of diamonds in the land in question ordered an inspection of the ground for the purposes of a pending action.</i>	
<i>London and South African Exploration Co. v. Griqualand West Diamond-Mining Co.</i>	4
Minor—Insolvency — Fraud — Ratification — Delivery of title deeds — Power of attorney.	
<i>The plaintiff's father, two years before his insolvency, purchased a farm in the Transvaal for his daughter and had the same transferred in her name.</i>	
<i>Two years after the date of insolvency the defendant, as trustee of the insolvent estate, obtained from the insolvent the title deeds of the farm and a power, signed by the plaintiff, who was still a minor, authorising the transfer of the farm, upon the insolvent's admission that the price</i>	

	PAGE
<i>of the farm had been paid in fraud of his creditors.</i>	
<i>The defendant never took any steps to have the transfer to the minor set aside or to recover the purchase price from the minor assisted by a curator.</i>	
<i>The plaintiff married while still a minor and was not aware of the delivery of the title deeds until it was discovered by her husband two years after the marriage.</i>	
<i>Nine years after such discovery the plaintiff brought an action to recover the title deeds and to have the power declared of no effect.</i>	
<i>Held, that, in the absence of sufficient proof of fraud, or of ratification, the plaintiff was entitled to succeed.</i>	
<i>Wolff v. Solomon's Trustee</i>	72
2.—Landed property — Sale by tutors dative—Transfer.	
<i>Tutors dative ordered to pass transfer to the purchaser of a farm, the property of a minor, the Court being satisfied that the price paid was fair and reasonable, and that the sale was to the interests of the minor.</i>	
<i>Hayward v. Gerd's Tutors dative and Curator ad litem</i>	207
Minor—Capital—Investment.	
<i>The Court, on being satisfied that it was to the interest of a minor, authorised the investment of a portion of his capital in the purchase of a valuable estate, which had been bequeathed by their father to the minor's half brother, who had died intestate before he had attained his majority, and where there was a strong presumption that the testator intended the estate to remain in his family.</i>	
<i>In re Irvine</i>	485
Minors—Funds in Master's hands—Ex parte McGibbon — Re Minors McGibbon	35
Minors' portions—Intestacy—Widow—Security.	
<i>Where it was clearly for the benefit</i>	

	PAGE
<i>of minors that the estate of their father, who had died intestate, and who had been married in community, should not be immediately realised to pay their portions, the Court allowed their mother to remain in possession of the estate, she undertaking to find security for payment of the minors' shares, and to educate and maintain them at her own expense.</i>	
<i>Re Clark's Estate</i>	59
Minor's property—Mortgage.	
<i>Under special circumstances, and where it was clearly for the benefit of minors, the Court authorised their father, who had bought landed property and had it transferred to himself in trust for his minor children, to mortgage the property for the purpose of raising money to build a cottage to be occupied by himself and his children.</i>	
<i>Ex parte Vallance</i>	285
Misjoinder — Exception — Summons — Declaration—Variance.	
<i>The defendants excepted to a declaration as being bad in law and embarrassing, on the ground that it is a misjoinder to join a cause of action against the two defendants as executors and individually and a second cause of action against one defendant individually in the same declaration.</i>	
<i>In fact, however, the declaration contained one count on a promissory note against the two defendants individually and a second count on a mortgage bond against the second defendant individually, although the first count in the summons was against both defendants as executors as well as individually.</i>	
<i>Held, that the exception to the declaration could not be sustained.</i>	
<i>Van Noorden v. Van Zyl</i>	165
Missionary Institution—Rules and Regulations—Magistrate's jurisdiction	

	PAGE
—Ejectment—Act 20 of 1856, section 10.	
<i>The rules of a Missionary Institution, which had been approved of by the Governor, provided in effect that a resident should forfeit his temporal rights at the suit of any of the missionaries, should it be proved to the satisfaction of the Magistrate of the district, that after reasonable warning, he persisted in disregarding the temporal regulations of the institution, and that his conduct and example tended to demoralise the inhabitants.</i>	
<i>Charges of intemperance and immorality having been proved against M., an inmate of the institution. in an action for ejectment brought against him by the resident missionary in the Magistrate's Court, judgment was given in favour of the plaintiff.</i>	
<i>M.'s right of occupation was of the value of £40.</i>	
<i>Held, on appeal, reversing the judgment of the Court below, that the Magistrate had no jurisdiction.</i>	
<i>Matthys v. Henning</i>	163
Negligence—Liability of Town Council	
—Contributory negligence — Contractor's negligence — Proximate cause.	
<i>Where two or more acts of negligence have contributed to cause an injury the test of liability for each act is whether the harm complained of is such as a reasonable man should have foreseen as likely to happen.</i>	
<i>The liability of one person for his act does not exculpate another person whose negligence has contributed to an injury which he ought to have foreseen as likely to happen.</i>	
<i>The Town Council of East London having engaged a contractor to reconstruct a road and to make an excavation immediately adjoining the road, the contractor's servants left</i>	

PAGE

PAGE

some casks of cement standing on one side of the road and placed some large stones near the excavation on the opposite side.

The plaintiff's horse, being driven past the casks, shied at the casks and bolted towards the excavation.

When one of the wheels of the cart was a few inches from the excavation the plaintiff jumped from the cart and alighted upon a stone. The horse and cart moved on and escaped unhurt, but the wheel of the cart struck the plaintiff's leg and broke it.

Held, on appeal from the East London Circuit Court, that, although the horse may in the first instance have shied at the casks, if the excavation was improperly made and then left unfenced by the defendants and they ought to have foreseen danger from their negligence, they would have been liable if the plaintiff had fallen into the excavation. Held, further, that if the plaintiff in jumping from the cart did what a reasonably prudent man, impelled by the instinct of self-preservation, would have done, he was not guilty of contributory negligence and the injury is legally attributable to the existence of the improper excavation, although the contractor may also be liable for improperly placing the casks in the street.

Newman v. East London Town Council 41
Notice of appeal—Resident Magistrate—Withdrawal.

When an appeal has been noted from a Magistrate's judgment, which has been carried into execution, and security found by the successful suitor under Act 20 of 1856, Schedule B, Rule 34, and the appeal is not prosecuted, notice of withdrawal should be given to the Magistrate.

Cloete's Trustee v. Green ... 264
Partners—Summons—Non-joinder—Exception.

P. sued R. in a Magistrate's Court upon a promissory note signed by R. and his partner L., the latter being at the date of the issue of the summons domiciled in the S.A. Republic, and not within the jurisdiction.

The Magistrate sustained an exception of non-joinder taken by R.

Held on appeal, reversing the Magistrate's decision that P. was justified in suing R., the partner within the jurisdiction.

Alcock v. Du Preez (Buch. 1875, p. 130) followed.

Pienaar v. Rattray ... 67

Partnership—Application for interdict refused.

Freemantle v. Henning ... 6

2.—Inspection of books—Independent accountant.

Partner in a mercantile business, unacquainted with bookkeeping, held entitled to inspect the books of the firm assisted by an independent accountant.

Van der Walt v. Pelser ... 375

Pauper suit - Divorce.

Application for leave to sue in forma pauperis in an action for divorce refused.

Ex parte Goulding ... 431

Plea in abatement—Fire policy—Cession—Proper person to sue.

T.'s premises, insured by the defendant company, having been destroyed by fire, the company in terms of its policy undertook to reinstate the premises.

Previous to the fire T. had assigned all his right, title, and interest in the policy to S., and had given the company notice of the cession.

The premises not having been rebuilt to T.'s satisfaction he sued the company for the amount of the policy. Held, on a plea in abatement, that S. was the proper person to sue, not T.

Trautmann v. Imperial Fire Insurance Company, Limited ... 68

	PAGE
Post-nuptial contract—Registration.	
<i>Where parties had married in England with the intention of excluding community, but had not entered into an ante-nuptial contract, the Court authorised the registration of a post-nuptial contract executed by them on their arrival in the Colony.</i>	
<i>Ex parte Taylor</i>	371
Poulds Act, 1892, section 29—"Stray animals."	
<i>Where a master had allowed his servant's cattle to remain on his farm after the servant had left his employment and subsequently impounded the cattle,</i>	
<i>Held, that the master could not be convicted of a contravention of section 29 of Act 15 of 1892, as the cattle were not "stray animals" within the meaning of that section.</i>	
<i>Van Heerden v. Jonas</i>	390
Prescription—Perennial stream—Artificial channel - Riparian proprietors.	
<i>Two perennial streams, the Groot River and the Middle River, have their source in Simonsberg in the Paarl District, and flow side by side in separate natural channels on to and through the quitrent farm "Wolvekloof," of which B. (defendant) owns one-fifth.</i>	
<i>From "Wolvekloof" the streams flow on to the farm "Annex," and thence to the farm "Le Plaisir Merle" (both the property of the defendant), where they meet, and under the name of the "Groot River," flow in one natural channel through the adjoining farm "Rust en Vrede," thence across the farm "Zion" into the farm "Watervliet."</i>	
<i>The river then crosses into the farm "Ongegund," where it joins the Berg River which passes through the farm "Kunenberg."</i>	
<i>On "Ongegund" and "Kunenberg" (the latter now divided into three farms) K., and the other plaintiffs</i>	

	PAGE
<i>have gardens, orchards, and cultivated lands.</i>	
<i>These lands are watered by leadings from small dams erected on each property along an artificial furrow constructed partly on "Watervliet," partly on "Ongegund," and partly on "Kunenberg," the furrow being fed from a dam (S.) on "Watervliet," constructed in the bed of the Groot River with the consent of a former owner of "Watervliet."</i>	
<i>This dam and furrow were constructed more than 100 years ago and have ever since continuously conveyed the Groot River water, which is diverted at dam S., and which has been used by the various owners of plaintiffs' lands both for domestic and irrigation purposes.</i>	
<i>On the original diagrams accompanying the grants of "Wolvekloof" and "Annex," both dated 15th September, 1819, the words "watercourse for Kunenberg and Ongegund" appear on the course of the Groot River, and in the original grant of "Wolvekloof" there is a provision that the watercourses are to run free and undisturbed, but there is nothing in the original grant of "Annex" prohibiting the owners of that farm from interfering with the water of the Groot River, whereas on the other hand it provides that "the grantee is bound within three years to bring the farm into such cultivation as it is capable of."</i>	
<i>During the past 30 years the present owner of "Annex," and his predecessors in title, used portion of the Groot River for irrigation and other purposes, the remainder being allowed, with a few interruptions at different times, to flow down in its ordinary course.</i>	
<i>Held, in an action by the owners of "Ongegund," and "Kunenberg," against the owners of "Annex," in which both parties claimed the ex-</i>	

PAGE

PAGE

clusive use of the Groot River, (1) that both claims had failed and (2) that the defendants had not acted in such a manner as to deprive the plaintiffs of their riparian rights.

Held, per Uppington J., that the artificial channel constructed from dam S. had acquired the attributes of a natural channel.

Kohler and Others v. Baartman ... 241

2. — Town Council—Public road—Inalienable land—Consent of Governor—Public square.

Prescription runs as against the Town Council in respect of land forming part of a public square, such land being alienable with the consent of the Governor.

Jones v. Town Council of Cape Town 27

Principal and agent—Donation exceeding £500—Non-registration.

Where an agent had been employed by his principal to realise an estate, and had deducted from moneys received by him on account of his principal the sum of £600, alleged to have been given by the principal as a donation to the agent's wife, the Court set aside the transaction on the grounds inter alia of non-registration, and that in the absence of a deed of donation, there was no clear indication of the donor's intention.

Laukester v. Morris ... 333

2.—Overcharges—Vouchers.

Where an agent had undertaken to import merchandise for his principal and had overcharged him considerable sums, and had failed to render vouchers for certain alleged disbursements in respect of freight, insurance, and dock dues, the Court ordered the agent to supply the vouchers within three months, although there was some evidence to show that it was not customary to render vouchers for such items.

Lazarus v. Levin ... 344

3. —

The plaintiff gave to K. certain sums of money amounting in all to £1,000 for the purpose of advancing the same to the defendant upon security of a bond to be passed by the defendant, but K. only paid £291 to the defendant and appropriated the balance to his own use.

Thereafter the defendant employed K. as his agent to borrow the sum of £1,000 on similar security and gave him a power of attorney to raise the money on mortgage but the name of the agent was left blank.

Held, that, in the absence of proof that the defendant had, before giving the power, authorised K. to receive any moneys on his behalf, the plaintiff was not entitled to recover more than the £291 paid on his behalf to the defendant.

Braude v. Executor of Verdoes... 184

4. — Father and son—Purchase—Ratification—Repudiation.

The defendant's son having telegraphed to the plaintiffs to purchase oats for account of his father, the plaintiffs purchased the oats, and informed the defendant by telegraph and letter of the purchase.

In an action for the price the defendant denied his son's agency.

It was proved that the plaintiffs' telegram and letter were received by the defendant's son, but that, before delivery of the oats, the son informed the father of the purchase on his account.

Held that, in the absence of any disavowal by the father, he must be deemed to have authorised the son to effect the purchase in his name and was therefore liable for the price.

Faure, Neethling & Co. v. Beyers ... 434

Proclamation 343 of 1894—Sale of liquor without a licence—Conviction—Partnership—Servants,

	PAGE		PAGE
<i>In January, 1894, a liquor licence was granted to B., who at that date carried on business at the Royal Hotel, Kokstad.</i>		<i>by the payee's indorsement in blank so as to found a provisional claim in favour of the bank as holder.</i>	
<i>In the following November, B. left the Colony.</i>		Standard Bank v. Marais 364	
<i>Before B. left he handed the business over to A., whom he had taken into partnership some time previously.</i>		2. — Promissory note.	
<i>On the 29th November, A. applied for a transfer of the licence to him and it was transferred on the 6th December.</i>		<i>Provisional sentence was granted on a promissory note where the defence was set up that the plaintiff was not the bona-fide holder for value of the note.</i>	
<i>On the 2nd December, W., who was in B.'s service before he left the Colony, and who remained in A.'s service after B.'s departure, was charged with and convicted of selling liquor without a licence in contravention of the Proclamation 343 of 1894, section 10.</i>		Van der Walt v. Kruger, Pelser & Co. 373	
<i>Held, on appeal, that although the evidence would have been sufficient to justify W.'s conviction for contravening the 4th and 5th sections of the Proclamation, his conviction under the 10th section was wrong, as W. was authorised by A. to sell liquor under the licence granted to his partner B.</i>		3. — Mortgage bond—Interest.	
Regina v. Ware 21		Lindenberg v. Naude 3	
Provisional sentence—Promissory note—Negotiable instrument—Indorsement—Cession.		Public body—Misfeasance — Negligence — Damage—Municipal drain—Adoption of private underground drain.	
<i>The defendant, being the maker of a note, whereby he promised to pay to B. or order the sum of £55, the amount to be deducted from another note made by B in his favour and payable at the same date, was sued on the note for provisional sentence by the Standard Bank, which claimed to be the legal holder by virtue of B.'s blank endorsement</i>		<i>The Town Council of Port Elizabeth, having statutory power to make and keep in repair the drains within the limits of the Municipality, constructed a drain into which surface waters collected from a considerable area flowed, and from which such waters were discharged into a surface drain in a private road belonging to H., but within the limits of the Municipality.</i>	
<i>Held (1) that the note, not being an unconditional promise to pay, was not a promissory note and (2) that the note, not being a negotiable instrument, could not be ceded merely</i>		<i>H., substituted a defective underground drain for such surface drain and, with the consent of the Town Council, connected it with the upper Municipal drain.</i>	
		<i>An obstruction having occurred in the lower underground drain owing to the gradual accumulation of gravel and débris discharged into it from the Municipal drain, the water was forced back and, escaping through the interstices between the bricks (which had been laid without mortar), penetrated underneath the foundations of the plaintiff's stores, into his stores and damaged his goods.</i>	
		<i>In an action against the Town Council for damages,</i>	
		<i>Held, that the adoption as part of the Municipal drainage system of a</i>	

	PAGE
<i>defective drain was as much an act of misfeasance as if the Town Council had itself constructed the drain, that the discharge of water and gravel into such a drain without the precaution of from time to time inspecting and, if necessary, cleaning it was an act of negligence, and that the Town Council was liable for damages which might reasonably have been foreseen as likely to be caused by such negligence.</i>	
O'Shea v. Town Council of Port Elizabeth	173
Public road — Natural obstruction — Interdict.	
<i>A road which had been used by the public for upwards of thirty years was obstructed at one part by a sand hill blown across it.</i>	
<i>Held, that those entitled to the use of the road had no right, without the permission of the owner of the land, to make a new track in a different direction and that, if owing to the impossibility of crossing the natural obstruction, they went round the sand hill, they should do so by the least circuitous route coming back to the existing road.</i>	
<i>The fact that the owner did not for a number of years object to the new track—which was made without any expense—being used does not debar him from his right to an interdict against its further use.</i>	
Assman v. Rautman	286
Receipts—Action to compel delivery.	
Smuts's Trustees v. Van Zyl's Executors.	91
Rent — Defence — Failure to execute written lease—Repairs.	
Rogers' Executors v. Jessop	95
2.—Evidence—Question of fact.	
<i>Magistrate's judgment reversed on a question of fact where the weight of evidence was against the Magistrate's finding.</i>	
Erentzen v. Devlin	329

	PAGE
Repealed Proclamation—Conviction.	
<i>Conviction under repealed Proclamation quashed</i>	
Regina v. Davis and Others	392
Restraint on alienation—Consideration — Pre-emption — Co-owners — Renunciation.	
<i>The co-owners in undivided shares of a farm entered into a contract among themselves that should any of them wish to alienate his share he shall be bound first to offer it to all his co-owners for a certain price.</i>	
<i>Held, that the contract was valid and could be enforced.</i>	
<i>The fact that the farm was subsequently subdivided or that some of the co-owners did isolated acts inconsistent with the terms of the original contract held to be insufficient to prove a renunciation of their rights of pre-emption by all the co-owners.</i>	
Smith v. Momberg and Others	300
Rule 36—Notice.	
<i>Where it is intended to apply to have property declared executable under Rule 36, notice of the application should be given to the defendant.</i>	
Engelbrecht v. Botha	366
Rule 319—Account.	
<i>Judgment given under Rule 319 for an account, which was ordered to be rendered within fourteen days, failing which, judgment was granted for a definite amount.</i>	
Scott v. McColla	352
Sale — Postponement — Insolvent's interest in land.	
<i>Where the sale of an insolvent's interest in certain land had been postponed for three months by order of Court to enable an action to be instituted to set aside the sale of a life interest in the land, and at the expiration of the three months no action had been commenced, the Court refused to order a further postponement of the sale.</i>	
Strydom v. Strydom's Trustee	144

	PAGE		PAGE
Sale of goods—Non-delivery within stipulated time—Onus.		rise he must elect whether he would accept the scrip which had been tendered by the defendant or claim the damages.	
<i>In an action on an oral contract for the sale of goods the defendants pleaded, as the defence for their repudiation of the contract, the non-fulfilment of a condition that the goods should be delivered by a specified date. Held, that the onus of proving that no such condition formed part of the contract lay on the plaintiff.</i>		Wolff v. Pickering 447	
Clements & Co. v. Vos. — Clements & Co. v. Van Rhyn 39		2.—Breach—Damages.	
Sale and purchase—Breach of contract—Failure of consideration—Repudiation of contract—Rescission of sale—Damages.		Du Preez v. Neethling 461	
<i>The purchaser of shares paid the price but did not receive delivery in due time.</i>		Sale of land — Purchaser's mistake—Interdict—Reasonable tender.	
<i>He did not thereupon repudiate the contract or claim a rescission of the sale on the ground of failure of consideration, but entered into negotiations with the seller for payment of damages caused by the seller's failure to deliver the shares.</i>		<i>Where a purchaser bought one lot of ground, No. 77, and shortly afterwards proceeded to build a house on the adjoining lot, No. 76, under the erroneous impression that lot 76 was the one which he had purchased, and on discovering the mistake applied to the Court for an interdict restraining the seller from disposing of lot 76, the Court refused the application on the grounds inter alia that it was unnecessary, as the seller had made a reasonable offer to transfer lot 76 to the purchaser, against transfer of lot 77, on the latter's paying all expenses.</i>	
<i>Five years afterwards he brought an action for damages for breach of contract, including in such action a claim to recover the price.</i>		Priem v. Winter 331	
<i>Between the date when the shares ought to have been delivered and the date of the action, both dates inclusive, the shares were unsaleable.</i>		Salvage—Derelict.	
<i>Held, that the measure of damages for breach of contract was the difference between the price paid and the highest market price, but that, as the shares were unsaleable between these dates, no substantial damages were claimable.</i>		<i>A ship, having been abandoned by the master and crew owing to her rudder being disabled, was rescued as she was nearing a rocky coast, whither she had drifted at the rate of about a mile an hour.</i>	
<i>Held, further, that if the plaintiff had repudiated the contract on the defendant's failure to deliver in due time he would have been entitled to claim a rescission of the contract and a return of the price, but that having treated the sale as still subsisting and entitling him to the benefits of a</i>		<i>The rescuers having done the work at some risk and with considerable skill,</i>	
		<i>Held, that they were entitled to salvage remuneration.</i>	
		<i>Held further, that, although it may not have been absolutely necessary for the master and crew to abandon the ship, yet as they had in fact abandoned her under circumstances of some danger, she must be deemed to have been a derelict, that although the risk to the salvors was not great, they were entitled to be remunerated on a liberal scale, and that under the circumstances one-sixth of the value</i>	

	PAGE
<i>of the property salvaged was a fair amount.</i>	
Associated Boating Companies v. Baarsden. Re "The Lief" ...	338
2.—Towage—Tender.	
<i>Salvage reward must be proportioned to the risk incurred by the salving vessel as well as to the danger of the vessel rescued from danger.</i>	
<i>The barque B., valued together with her cargo and freight at £14,000, having been considerably damaged by a gale, was rescued from a position of probable but not imminent danger about five miles from the shore and towed for about nineteen hours into a harbour by the steamship C., valued with her cargo at £18,300, but the sea was calm and the risk to the salving vessel was small.</i>	
<i>Held, that the sum of £1,000, which had been tendered, was a fair and generous remuneration for the services performed.</i>	
Randall v. Gray. Re "The Blairhoyle" ...	395
Servant—Bank in liquidation—Gratuity.	
<i>The Court authorised the liquidators of a bank to pay a gratuity of £100 to an old and faithful servant who had lost his situation in consequence of the bank's failure.</i>	
Ex parte Smith ...	417
Servitude against obstruction of light—Construction—Servient and dominant tenement.	
<i>A servitude against the obstruction of light by the owner of land was constituted in the following terms: "The proprietors of this lot shall by no means whatever obstruct the windows of the store of lot No. 3 looking into the passage belonging to lot No. 1 nor prevent free access of light into the same."</i>	
<i>Held, that the servitude applied to windows of the store in existence at the time when the agreement for a servitude was made and that the owner of the servient tenement should not</i>	

	PAGE
<i>be interdicted from obstructing the light entering the store by means of additional window space constructed by the owner of the dominant tenement.</i>	
St. Leger v. Town Council of Cape Town ...	264
Setting aside judgment—Rule of Court 329—Entering appearance—Mistake.	
Haase, Vaughan & Co. v. Malcolm's Trustee ...	23
Shares—Alleged sale—Conflict of evidence—Credibility—Character of witnesses.	
Walder v. Krynauw ...	31
Slander—Publication—Admission.	
<i>The Court, on appeal, refused to reverse a Magistrate's judgment awarding damages in an action for slander, where although no evidence of publication had been given, still there was a clear admission in a letter of apology signed by the defendant that she had used the words complained of.</i>	
Hope v. Illario ...	126
Small debt—Land—Attachment ad fundandam jurisdiction—Intendit.	
<i>In granting an order to attach property to found jurisdiction, and giving leave to sue by edict for the recovery of a small balance of account, the Court directed that the intendit should not be served until the defendant had been communicated with and had refused to pay the debt and costs.</i>	
Bould and Barter v. Abas ...	402
Special Justice of the Peace—Jurisdiction—Masters and Servants Act—Compensation.	
<i>A Special Justice of the Peace has no jurisdiction to order compensation under Act 15 of 1856, section 13.</i>	
Regina v. Zwart, alias Izlant and Jantjes ...	140
Splitting of claims—Exception—Slander—Wrongful dismissal—Damages—Magistrate's jurisdiction.	

	PAGE
<i>R. issued two summonses against F., one claiming £20 damages for slander and the other £20 damages for wrongful dismissal.</i>	
<i>The slanderous words were spoken and the wrongful dismissal took place on the same date.</i>	
<i>The Magistrate, before whom the first case was heard, sustained an exception that there had been a splitting of claims.</i>	
<i>Held, reversing the Magistrate's decision, that there was no such legal connection between the two claims as to make a judgment in one decisive in the other.</i>	
Ross v. Farmer	24
Stale demand—Satisfactory evidence of non-payment of debt.	
<i>In cases of stale demand the Court will require clear evidence of the non-payment of the debt in respect of which the demand is made.</i>	
<i>Where therefore such evidence was forthcoming, the mere fact that the summons had only been issued a few days before the period of prescription would have expired, held not to be a bar to the plaintiff's succeeding.</i>	
De Villiers v. Deyzel	413
Summons — Exception—Plaintiffs' right to sue—Limited company—Authority.	
<i>A director and the secretary of a limited company issued a summons claiming an amount due for goods sold and delivered to the defendant.</i>	
<i>The summons alleged inter alia that the plaintiffs were the joint managers of the business, and were duly authorised to collect and sue for all accounts owing to the firm.</i>	
<i>The defendant excepted to the summons on the ground that it did not allege in what manner the plaintiffs had been authorised to sue, whether under the articles of association, the trust deed, by resolution of share-</i>	

	PAGE
<i>holders, by power of attorney, or otherwise.</i>	
<i>The Magistrate before whom the case came overruled this exception.</i>	
<i>Held, on appeal, upholding the Magistrate's decision, that the exception was bad, as there was a definite allegation in the summons that the plaintiffs were authorised to sue, no attempt having been made by the defendant to disprove that allegation.</i>	
Stoffel v. Mills and Rethman (Limited)	29
2. —Detective return.	
<i>Where on a claim for provisional sentence the return on the summons had not been made by the Deputy Sheriff, the Court ordered the case to stand over for an amended return.</i>	
Purcell v. Mare	370
Tender — Insufficiency — Work and labour.	
Beetham v. Slanie	100
Theft Remittal—Review.	
<i>Where a prisoner, charged on two counts (1) with contravening Act 35 of 1893, section 25, and (2) with theft, pleaded guilty, and the case was remitted by the Attorney-General for trial on the charge of theft only, and the Magistrate tried the prisoner on both counts, found him guilty, and sentenced him to a term of imprisonment on each charge, the Court on review quashed the conviction on the first charge.</i>	
Regina v. Sym	13
2. —False pretences—Promise to perform work.	
<i>Where a person had obtained goods on a promise to perform work in return for the value of the goods and failed to fulfil his promise,</i>	
<i>Held, that he could not be convicted of theft by means of false pretences.</i>	
Regina v. Boi Lockenberg	369
3. —False pretences—Conviction.	
<i>The accused, being the owner of five goats which were pledged for</i>	

PAGE

a debt, obtained goods from the prosecutor on the promise to deliver three of the goats to the prosecutor within eight days.

The goats were not delivered and the accused was charged in the Magistrate's Court with theft by means of false pretences and convicted.

Held, that the conviction was wrong, inasmuch as there was no evidence of any false statement or representation having been made by the accused.

Regina v. Swart ... 426

4. — Act 35 of 1893 — Evidence sufficient to justify conviction.

Regina v. Neethling ... 65

Trade mark.

Application on motion for the removal from the register of the trade mark CKing, alleged to be an infringement of the trade mark "K" in a diamond, refused, on the ground (1) that the application was made twelve months after registration, (2) that there was no proof that anyone had been deceived, and (3) that the applicant himself, when first informed of the mark being used by the respondent in the Transvaal, found no fault with it.

Leave given to applicant to institute action for infringement of his trade mark.

Somervell Bros v. Cuthbert & Co. ... 266

2. — Infringement of—Fancy design—Label.

A label with a fancy design in blue and silver having been registered as the trade mark of the manufacturers of brandy, the respondents used upon their bottles of brandy a label with exactly the same design and with the words "Cognac" and "Old Brandy" in exactly the same places as on the registered label, so that at a distance of four or five yards no difference was discernible.

Held that, although neither the applicants' name nor the sign of a

PAGE

bird on a shield was appropriated, the close similarity was calculated to deceive the ultimate consumers, and that the imitation constituted an infringement of the trade mark.

Interdict granted, but its operation suspended for three months.

Martell & Co. v. Paarl Berg Wine Co.... 330
Transfer deeds—Registration—Error.

Where transfer deeds had been erroneously registered in the Deeds Office, Cape Town, instead of in the Deeds Office, King William's Town, the Court authorised the cancellation of the originals and the issue of certified copies to be registered in the King William's Town Office as having been passed on the dates mentioned in the deeds.

Ex parte Oosthuizen ... 260

Transfer duty—Act 5 of 1884—Heirs—Exemption—Registrar of Deeds.

Husband and wife bequeathed their two farms O. and B. to their seven sons for the sum of £1,400.

The testator died first and at his death O. was held by him under a quitrent grant, and B. was held by him on lease from Government.

A sum of money was taken out of the estate for the purpose of acquiring B., but the agent who was entrusted with the matter became financially involved and both money and farm were lost to the estate.

One son died leaving issue, and a daughter was born subsequent to the making of the will, so that at the death of the testatrix there were living seven children and the issue of the predeceased son.

The executor of the estate obtained an Order of Court sanctioning the conveyance of O. to the heirs for £700; the Court also authorised him to overlook in the transfer two of the six sons, who had neglected to adiate, and to transfer their shares to such of the other sons as might be willing to take them.

	PAGE
<i>Subsequently two other sons declined to adiate and of the two remaining sons, L. and J., who adiated, L. accepted the four vacant shares and thus became entitled to five-sixths of the farm and J. to one-sixth.</i>	
<i>The executor thereupon proceeded to pass transfer of the farm to L. and J. in the proportions of five-sixths and one-sixth respectively, and tendered transfer duty receipts showing an exemption allowed to each of them by the Civil Commissioner of one-eighth of the value (£700) of the whole farm.</i>	
<i>The Registrar of Deeds took exception to these allowances by the Civil Commissioner and contended that J. was only entitled to exemption upon one-eighth of one-sixth of the value of the farm and L. to one-eighth of five-sixths.</i>	
<i>On application being made to the Court the contention of the Registrar of Deeds was sustained.</i>	
Nolte v. Registrar of Deeds	105
Trial — Application for postponement refused.	
<i>Where in an action against the Colonial Government the declaration had been filed on the 12th November, the pleadings closed on the 6th December, and the case set down for trial on the 28th February,</i>	
<i>The Court, on the application of the defendant, refused to order a postponement until the May Term.</i>	
Cook Bros. v Colonial Government ...	58
Trial—Removal.	
<i>The Court refused to order the removal for trial to Kimberley of a cause which had been set down for hearing in the Supreme Court, where (1) the amount in dispute was large, (2) the witnesses were few, and (3) there was an absence of proof that the applicant (defendant) would be prejudiced by the case being tried in the Supreme Court.</i>	
Gasson v. Blacking and Izdebeski ...	437

	PAGE
Trustee—Misconduct—Insolvent estate.	
<i>The first duty of a trustee of an insolvent estate is to advance the interests of the estate which he administers, and if he wilfully damages such interest, in order to advance his own, he is guilty of misconduct.</i>	
<i>At the third meeting of creditors of an insolvent estate a resolution was proposed that a certain auctioneer should conduct the sale of the assets, to which the respondent, one of the trustees, acting under powers of attorney, proposed and seconded an amendment that he should himself be the auctioneer.</i>	
<i>The original resolution having been carried, his co-trustee advertised the sale, but on the day advertised the respondent appeared and did everything in his power to obstruct the sale and prevent its being a success.</i>	
<i>He also proceeded with litigation against the wishes of his co-trustee.</i>	
<i>On the application of certain creditors the respondent was removed from his trust.</i>	
Hall & Orsmond v. Fitzgerald	282
2.—Consent to transfer of land—	
Right of pre-emption.	
<i>Certain land was transferred to four purchasers and a deed of sale was executed and registered with the transfers giving the purchasers inter se certain rights of pre-emption.</i>	
<i>Thereafter one of the purchasers became insolvent and his interests in the land were sold for the benefit of his creditors to his trustee, the bondholder.</i>	
<i>Subsequently one of the purchasers with the consent of his co-purchasers, including the insolvent, sold his land to a stranger.</i>	
<i>The trustee declined to sign a document consenting to the sale and in consequence the Registrar of Deeds refused to pass transfer.</i>	
<i>On application being made to the Court for an order compelling the</i>	

PAGE

trustee to consent, a rule nisi was granted calling upon him to show cause why the Registrar of Deeds should not be authorised to allow transfer, without his consent, either individually or in his capacity, and on the return day the rule was made absolute with costs de bonis propriis against the trustee.

Lamprecht v. Lamprecht's Trustee ... 361

Trustees — Decease — Election of new trustees—Confirmation.

Where certain buildings and land had been transferred to trustees, in trust for a Malay Congregation, to be converted into a mosque, and the trustees had died, the Court confirmed the appointment of new trustees elected by the congregation.

The Court refused to authorise the trustees to mortgage a portion of the land for the purpose of erecting new buildings, &c., there being a condition in the instrument creating the trust which imposed a restraint upon alienation except for certain specified purposes.

Ex parte Rakiep and Others ... 418

Tutors — Misconduct — Removal — Alienation of land—Jurisdiction of Eastern Districts Court—Ordinance 105, section 24.

In an application for removal of the tutors of a minor from their office on the ground that they had sold a farm belonging to him for less than its fair price, and had failed, within a reasonable time, to pay the purchase price received by them to the Master of the Supreme Court, Held, that inasmuch as they obtained the authority to sell from the Eastern Districts Court in the belief that such Court had jurisdiction and were afterwards directed by a Judge of that Court to let the order remain in abeyance, pending further inquiry, they were not guilty of such misconduct as would justify their removal.

PAGE

The Eastern Districts Court, as such, has no jurisdiction to authorise the sale of a minor's land not situated within the Eastern Districts

Quære, whether a Judge of that Court has such jurisdiction under the 24th section of Ordinance No. 105.

Coleman v. Gerds' Tutors. In re Gerds 167

Undue preference — Insolvent Ordinance, section 84—Act 38 of 1884, section 8.

Pledge of cattle declared an undue preference where the transaction took place three months before sequestration, the pledgor being at the time hopelessly insolvent.

Botha's Trustee v. Gray... 298

2.—Insolvent Ordinance, sections 84 and 90—Pleadings—Tender.

In August, 1894, S. advanced to W. £62, as security for which W. pledged to S. certain live-stock.

In the following October W. having bought certain carts on credit allowed S. to sell two, of the carts and out of the proceeds to pay himself the £62, whereupon S. redelivered to W. the pledged stock, the value of which was found by the Court to be about £40.

W. surrendered his estate in January, 1895.

Held, in an action by the trustee of W.'s estate against S. that the payment by the insolvent to S. in October, 1894, was an undue preference to the extent of £20, the difference between the amount of the payment and the value of the pledge.

Where it is intended to rely on the 90th section of the Ordinance that section should be pleaded.

Van der Westhuizen's Trustee v. Steyn 313

3.—Insolvent Ordinance sections 84 and 86—Transaction in the ordinary course of business.

T. & Co., the holders of an overdue promissory note, having received information that H., the maker of the note, of whose financial position

	PAGE
<i>they were ignorant, was about to hold a sale of cattle, sent the note to the auctioneer for collection, there being no bank in the village.</i>	
<i>The auctioneer, with the consent of H., deducted the amount of the promissory note from the proceeds realised by the sale of the cattle and remitted it to T. & Co.</i>	
<i>This transaction took place in April, 1895, and in the following month H. surrendered.</i>	
<i>Held, in an action by H.'s trustee against T. & Co. to have the payment of the note declared an undue preference, that the transaction was in the ordinary course of business and was protected by the 86th section.</i>	
Horwitch's Trustee v. Twentyman & Co.	323
Usufruct — Lease — Sub-lease—Assignment of lease—Insolvency of lessee—Insolvent Ordinance, section 104—Improvements—Tacit re-location. <i>A life usufructuary has no right to grant a lease extending beyond the period of his own life.</i>	
<i>The insolvency of a lessee puts an end to the lease, although the land may have been sublet by the lessee for the full period of his term.</i>	
<i>The insolvency of the lessee would not terminate the lease if, before the date of the insolvency, there had been a complete assignment of an assignable lease to a third party, but clear proof would be required that an absolute assignment was intended, and that due notice of the assignment had been given to the lessor.</i>	
<i>Where a lessor takes advantage of the law, which puts a premature end to a lease upon the insolvency of the lessee, he is liable, in the absence of any stipulation to the contrary, to the trustee of the lessee's estate for the value of improvements made by such lessee in contemplation of the lease being allowed to run for its</i>	

	PAGE
<i>full term and to a sub-lessee, to whom the lessee had legally sublet the land before his insolvency and who in contemplation of the lease continuing to its end had made such improvements.</i>	
<i>The mere receipt of rent by the lessor after the termination of the lease by effluxion of time, or by the operation of the Insolvent Ordinance, does not constitute a tacit re-location for the full period of the lease.</i>	
Parkin v. Lippert and Parkin	211
2. ——Mutual will—Security—Minors Administrators — Re-marriage of surviving spouse. <i>Husband and wife, married in community, by mutual will reciprocally bequeathed to the survivor the life usufruct of their joint estate, and appointed the children of the marriage as heirs of such estate subject to the usufruct.</i>	
<i>The testator appointed the respondents as executors of his will, administrators of his estate and, in the event of the wife's marrying again, guardians of his minor heirs.</i>	
<i>The testator died first and some years afterwards the survivor, the applicant, married again, whereupon the respondents claimed the sole control and administration of the joint estate.</i>	
<i>Held that, although the applicant might be liable to give security against misappropriation or waste, she was entitled, as usufructuary, to the control and administration of the joint estate.</i>	
Furnivall v. Cornwell's Executors	14
Voluntary escape—Indictment—Abrogation of laws—Disuse. <i>The matron of a prison was lawfully directed to convey a female prisoner from one gaol to another and on the way she voluntarily allowed the prisoner to escape.</i>	

	PAGE
<i>She was indicted for "voluntary escape" and convicted.</i>	
<i>Held, upon a question reserved, that the indictment disclosed a criminal offence according to the law of this colony.</i>	
<i>Held, further, that the punishment for the offence is discretionary.</i>	
Regina v. Loftus	469
Waiver of rights—Marriage in community—Sale of property—Consent in ignorance of rights—Trespass—Damages.	
<i>Where a woman by virtue of her marriage in community had become entitled to a half-share in certain landed property, and without being fully acquainted with her rights consented to a sale of the property by her children, who were entitled to the other half,</i>	
<i>Held that, there had been no waiver of her rights, and that she was entitled to succeed in an action for trespass and damages against the purchaser, who was in occupation of the land.</i>	
Steenkamp's Executrix v. Weise ...	60
Warrant of apprehension — Criminal offence — Summary jurisdiction — Divisional Councils Act, 1889, sections 153 and 154—Swing gate.	
<i>Except where otherwise specially provided by law, warrants for the apprehension of persons charged with offences, which plainly appear to be proper for a Court of summary jurisdiction, should not be granted unless the person charged shall first have been summoned and shall have neglected, on the day appointed by the summons, to appear to answer the charge.</i>	
<i>To support a prosecution for a contravention of the 154th section of the Divisional Councils Act, 1889, it is not necessary to prove that the Divisional Council has approved of the swing gate, which the defendant is charged with having left open.</i>	

	PAGE
<i>A person so charged should not be arrested until he has neglected to appear to a proper summons.</i>	
Willemse and Others v. Lategan ...	350
Water concession—Construction—Municipality.	
<i>The Municipality of C. granted A. a concession to supply the Municipality with water.</i>	
<i>The concession was granted subject to the conditions following:</i>	
Clause 5.	
<i>The said Ackerman shall place three hydrants at his own cost and charges for the purpose of extinguishing fire at such spots within the said Municipality as the said Council shall indicate, provided such spots are within 60 feet of any main of the said Ackerman, and shall and will supply such quantity of water as the said Council may from time to time require to be supplied for the purpose of extinguishing fires or for other purposes of the said Municipality, such as watering roads, flushing, &c., at the rate of £2 for every 40,000 gallons supplied.</i>	
<i>Held, that the words shall and will supply referred only to the three hydrants, and that the Municipality could not compel A. to place as many hydrants as they might think fit, provided the Municipality paid for their erection, and to supply the water at £2 for every 40,000 gallons.</i>	
<i>Held, further, on the construction of the same clause, that the Municipality could not compel A. to bring water to the Municipal washhouses, which were situated at a greater distance than 60 feet from one of A.'s mains.</i>	
<i>Clauses 2, 3 and 6 were in effect as follows:</i>	
<i>The said Ackerman shall be bound to supply such quantity of water, not exceeding 200,000 gallons per diem, as the plaintiff Council and the inhabitants entitled thereto may require, at a price not exceeding £2 10s. per annum for each 100 gallons supplied per diem (clauses 2 and 3).</i>	

PAGE

The said Ackerman shall be bound to lay down and keep in repair all mains in the main road within the said Municipality, and to lay down main or other pipes, exclusive of private water-leavings, necessary for the efficient supply of water in all streets and thoroughfares at his own cost and charges upon receiving a guarantee from the owners of property within the said Municipality, for whose sake such main or other pipes are laid down, that they will take a supply of water for a term of three years sufficient to yield a return equal to 15 per cent. per annum on the amount expended on the main or other pipes specially laid down for the supply of water to such proprietors (clause 6).

Held, upon the construction of clause 6, that that clause applied only to such ratepayers and inhabitants as required water and were willing to pay for it under clause 2.

Claremont Municipality v. The Cape Town District Waterworks Company, Limited ... 478

Watermill — Servitude — Grant — Diversion of water — Interdict — Forfeiture.

In 1831 the Governor sold and granted to the plaintiff's predecessor in title a plot of ground on condition that "the proprietor shall have no right or privilege whatever with regard to the main stream to supply the town of Worcester, save and except of using it for the special purpose of keeping the watermill at work" and that if the proprietor shall make any "deviation of the water he shall forfeit for ever the right or privilege of water hereby granted."

Before the grant no water was taken out of the stream above the mill for the supply of the town, but in 1874 the Municipality constructed waterworks diverting a portion of the stream above the mill and the Government, with the consent of the Municipality, also diverted a portion

PAGE

for railway purposes, but no objection was raised by the owner of the mill until 1892, when the capacity of the pipes for diverting the water was increased.

Held, that the grant constituted a servitude to lead the main stream over the mill for the purpose of having the full use of its water power, and that the plaintiff, as the present owner of the mill, was entitled to an interdict restraining the increased diversion.

The owners of the mill had for many years been in the habit of using some of the water for domestic purposes and for irrigating a small garden without any objection on the part of the Government or of the inhabitants of the town and without any perceptible diminution of the stream.

Held, that such user could not now be relied upon as a ground for forfeiting the plaintiff's servitude under the grant.

Joubert v. Worcester Municipality and Colonial Government ... 303

Will — Construction — Usufruct — Substitution — Children.

Husband and wife, by their mutual will, appointed the survivor and the children of the marriage as their heirs and, in case of predecease of one or more heirs, such predeceased's legitimate descendants "and that of all goods to be relinquished, both movable and immovable."

The testators then proceed to specify the particular farm which each child should take, subject to a life usufruct in favour of the surviving testator, and inter alia, assign a certain farm "to our daughter D. and the children born of her marriage with W."

Held, that on the death of the first dying D. became entitled to the farm subject to the usufruct in favour of the survivor, and that the children were only intended to be substituted

	PAGE
<i>in case of D. 1 redeceasing the first dying testator.</i>	
Human v. Human's Executors (10 Juta, 172 ; 3 Sheil, 160) followed.	
Wannenbure v. Le Roux and Others ...	388
2. — Husband and wife—Adiation—Acceptance of benefits—Usufruct—Mortgage by executor.	
<i>Husband and wife, married in community of property, made their joint will by which they appointed the survivor and children of the marriage as heirs of the first dying, and bequeathed a certain farm to the children subject to a life interest in favour of the survivor.</i>	
<i>The wife died first leaving one child, the plaintiff, and the survivor took out letters of administration and remained in possession of the farm. In his account of administration he awarded himself a child's portion and did not for twenty years after his wife's death repudiate the will.</i>	
<i>Held that, although in his account he awarded to the plaintiff, as her maternal inheritance a sum based upon the valuation of the farm, there was such an acceptance of benefits as to make the legacy of the farm binding on him at the suit of the plaintiff on her coming of age.</i>	
<i>Held, further, that his co-defendants to whom he mortgaged the farm after his wife's death, but not for payment of debts of the joint estate, were not entitled to enforce the bond against more than his half-share of the farm after his death, but that, as to the other half, the bond was valid in the absence of proof that the mortgagees were aware that he had only a life interest in the farm.</i>	
Williams v. Williams and Others ...	403
3. — Intention — Vesting — Usufruct — Fidei-commisum — Legacy — Intestate succession.	
<i>By the joint will of N. and his wife certain farms were bequeathed to</i>	

	PAGE
<i>their sons, after the death of the surviving testator, for a certain sum to be paid to the daughters of the testators.</i>	
<i>This and other portions of the will indicated an intention to defer the enjoyment of the legacy but not to postpone its vesting until the death of the surviving testator, but the will contained an obscure c'ause which the Court construed to mean that the survivor should have the right to reduce the amount to be paid by the sons for the farms.</i>	
<i>Held, that this provision did not indicate any intention to postpone the vesting until the survivor's death. One of the sons died intestate and without issue after his mother, the testatrix, but before his father, the surviving testator.</i>	
<i>Held. that his heirs ab intestato were his father and his brothers and sisters, and that his interest in the legacy passed to such heirs.</i>	
Nel v. Nel's Executrix ...	472
4. — Joint estate—Husband and wife—Executors of first-dying—Executors of survivor.	
<i>A husband and wife, married in community, made their joint will by which the first-dying appointed the survivor together with the children of the marriage as his or her heirs, but directed that, unless the survivor should re-marry, he or she should remain in possession of the joint estate.</i>	
<i>The testators further appointed the applicants as executors of the will. The wife died first and the husband remained in possession of the estate. The Executors took out letters of administration, but did not take possession of any of the assets.</i>	
<i>The survivor, by his will, appointed the respondent as his executor Upon his death without having re married,</i>	

	PAGE
<i>Held, that the applicants, as executors of the first-dying, were entitled to take part with the respondent, as the executor of the survivor, in the realisation and division of the joint estate, and that they could not be excluded from a voice in the mode of realising the immovable property of such joint estate, although only the executor of the survivor, in whose name it was registered, could pass formal transfer.</i>	
Goedhals' Executor v. Goedhals' Executor	377
5. ——— Ordinance No 15 of 1845—Signature of testator.	
<i>An instrument purporting to be the last will of L. was written on more leaves than one and was signed at the foot by L. and witnesses but was signed only by the witnesses and not by L. on the first leaf.</i>	
<i>The contents of the second leaf would be unintelligible without the first leaf.</i>	
<i>Held that, as the first leaf was an integral part of the instrument, the second leaf could not be admitted to probate without the first, and that, as the first leaf was not signed by the testator, the instrument could not be accepted as a whole.</i>	
<i>Ex parte Lloyd. Re Lloyd's Will</i> ...	150
6. ——— Construction — "Sons" — "Grandsons."	
<i>Husband and wife, by their mutual will, appointed each other reciprocally, together with their children as the heirs of all the property "to be relinquished on demise," on certain conditions including the following: that "all our fixed property be bequeathed to our sons jointly or their lawful representatives in order at their majority or marriage to make a joint use thereof with the survivor," and that "after the death of the survivor our joint fixed property shall be put up to auction among and for the benefit of our sons collectively, the amount</i>	

	PAGE
<i>whereof shall be equally divided among all our children collectively or their representatives per stirpes, with this understanding, however, that to each of the stirpes sons as well as daughters who shall not attain to any share in these places, whether by bequest or by sale, a sum be secured of at least £200 which shall have to be paid out to them at the death of the survivor by the sons who come into possession of the places " :</i>	
<i>Held, that upon the death of the surviving testator only his sons, and not his grandsons, were entitled to bid at the sale by auction of the land.</i>	
<i>There is no rule that the term "sons" includes grandsons of the testator, but the questions whether grandsons are so included is one of intention to be gathered from the context and from the general provisions of the will.</i>	
<i>Meyer v. Meyer's Executors</i>	248
7. ——— Mistake in name—Master of Supreme Court.	
<i>A will was duly executed and signed by Jacobus Christoffel Zeeman but, by mistake, it purported to be the will of Jacobus Charles Zeeman,</i>	
<i>Held, that the mistake did not invalidate the will, and the Master was accordingly authorised to accept it as the will of Jacobus Christoffel Zeeman.</i>	
<i>Zeeman's Executors v. Master of the Supreme Court</i>	487
8. ——— Non-execution in terms of the Ordinance—Invalidity.	
<i>Cross v. Cross's Executors</i>	459
Wills Ordinance—Signature—Initials—Testator.	
<i>A signature by means of the testator's initials is a sufficient compliance with the requirement of the Wills Ordinance that he shall sign his name.</i>	
<i>The testatrix and witnesses duly signed at the foot of a will written upon more pages than one, but the only signature of the testatrix to the</i>	

PAGE	PAGE
<i>first leaf was made by means of her initials just above the initials of the witnesses, apparently made with the view of authenticating an erasure on the second page.</i>	<i>In re Ebdens Will (4 Juta, 495) approved.</i>
<i>Held, that when once the genuineness of the initials was established there was a sufficient compliance with the requirement of the Ordinance that the testator and witnesses shall sign their names upon at least one side of every leaf.</i>	<i>Van Vuuren's Case (2 Searle, 116) overruled.</i>
	<i>In re Trollip</i> 258
	<i>Writ of arrest—8th Rule of Court.</i>
	<i>Writ of arrest refused where no application had been made to the Registrar under the 8th Rule of Court.</i>
	<i>McCahy v. Williams</i> 136



Stanford Law Library
3 6105 063 309 277